

STATE WATER RESOURCES CONTROL BOARD

THE AUGMENTATION OF THE ADMINISTRATIVE RECORD AND
RECONSIDERATION OF WATER RIGHT DECISION 1644
IN LIGHT OF ADDITIONAL SPECIFIED EVIDENCE AS DIRECTED
BY THE YUBA COUNTY SUPERIOR COURT

THURSDAY, JUNE 5, 2003
9:00 A.M.

JOE SERNA CAL/EPA BUILDING
COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA

REPORTED BY:

ESTHER F. SCHWARTZ
CSR NO. 1564

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APPEARANCES

STATE WATER RESOURCES CONTROL BOARD:

ARTHUR G. BAGGETT, JR., CHAIR
GARY M. CARLTON

STAFF:

ERNEST MONA
ANDREW FECKO

COUNSEL:

DANIEL FRINK

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REPRESENTATIVES

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BY: WILLIAM D. CUNNINGHAM, ESQ.

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REPRESENTATIVES (CONT.)

FOR DEPARTMENT OF INTERIOR:

OFFICE OF THE REGIONAL SOLICITOR
2800 Cottage Way
Sacramento, California 95825
BY: ALF W. BRANDT, ESQ.

FOR WESTERN WATER COMPANY:

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 Capitol Mall, 27th Floor
Sacramento, California 95814
BY: SCOTT A. MORRIS, ESQ.

FOR WESTERN AGGREGATE, INC.: (Not present)

MICHAEL MILLS, ESQ.

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SACRAMENTO, CALIFORNIA

THURSDAY, JUNE 5, 2003, 9:00 A.M.

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CHAIRMAN BAGGETT: Good morning. Apologize for the delay here. Things are happening too fast in the last week of the session.

This is the time and place for the hearing on augmentation of the administrative record and reconsideration of Water Right Decision 1644 in light of additional specified evidence as directed by Yuba County Superior Court. Water Right Decision 1644 addresses fishery protection and other water right issues on the Lower Yuba River between Englebright Reservoir and Marysville. This hearing is being held in accordance with the Notice of Public Hearing dated May 23, 2003.

I am Art Baggett, Chair of the State Water Resources Control Board. With me today is my colleague Gary Carlton. We are assisted by Senior Staff Counsel, Dan Frink; Ernest Mona and Andy Fecko from the Division of Water Rights.

The State Water Resources Control Board has previously conducted extensive hearings on the fishery and water right issues on the Lower Yuba River and has compiled a lengthy evidentiary record regarding issues addressed in Decision 1644. The purpose of this

1 supplemental hearing is to consider the additional
2 evidence specified by the Yuba County Superior Court in
3 accordance with the Peremptory Writ of Mandate issued on
4 May 5th, 2003.

5 The additional evidence that the Court has directed
6 the Board to consider is identified in the staff list of
7 exhibits attached to the hearing notice. This hearing
8 provides an opportunity for parties to address the
9 evidence identified by the Court, to conduct
10 cross-examination of that evidence and present relevant
11 rebuttal evidence. In accordance with the instructions in
12 the hearing notice presentation of evidence and
13 participation of evidence and participation in
14 cross-examination is limited to parties who have submitted
15 written Notices of Intent to Appear that indicate their
16 intention to present evidence or participate in
17 cross-examination. Parties may also present arguments
18 regarding the issues in the hearing notice.

19 As stated in the hearing notice, the four key issues
20 to be addressed -- and I think we'd really like the
21 assistance of all parties to really stick to those four
22 issues. This the record is, what, 17 years' worth at this
23 point and many days of hearings. So this is a very narrow
24 opening as directed by the Court.

25 The first key issue: Do the depositions of former

1 or present State Water Resources Control Board staff
2 members Mike Meinz, Alice Low and Andrew Sawyer, dated
3 October 10th, 2002, October 11th, 2002 and December 23,
4 2003, respectively, present evidence establishing that any
5 party to the proceedings leading to Decision 1644 was
6 denied a fair hearing or due process of law in those
7 proceedings?

8 Second: Should Decision 1644 be revised based on
9 the evidence on fishery issues presented in the
10 declaration of William Mitchell dated March 11, 2003, and
11 the declaration of Paul Bratovich dated March 13, 2003?

12 Third: Should Decision 1644 be revised based on the
13 evidence of water demand and usage presented in the
14 declaration of Curt Aikens dated March 13, 2003?

15 And fourth: Should Decision 1644 be revised based
16 on the evidence regarding present and projected electrical
17 energy supply and demand conditions as reported in the
18 report of the California Energy Commission to the
19 California Senate Energy Committee on January 28, 2003?

20 After the hearing record is closed, the Board will
21 consider the evidence, and a proposed order will be
22 prepared for consideration at a Board meeting. Parties to
23 the hearing will be sent notice of any Board meeting
24 scheduled for consideration of the proposed order.

25 I think I just want to divert here and make a couple

1 comments before we get into some of the procedural issues
2 and address some of the concerns raised by a number of
3 counsel.

4 I just want to make it real clear, this Board takes
5 very seriously the judgment entered on its Decision by the
6 Superior Court. This hearing today is being held as
7 ordered by Judge Barclay to consider the evidence as
8 noticed and weigh the testimony to be given within the
9 time period as ordered by that Court. Upon
10 reconsideration, the Board will adopt an order as directed
11 by the Court.

12 I just also want to note as we said at the close of
13 the prior proceeding when we adopted 1644, the Board still
14 continues to encourage parties to continue to work on
15 settling disputes outside of these proceedings. To that
16 end the Board will remain open channels and will consider
17 any offers of settlement that all the parties to this
18 proceeding can bring forward. But at this point in time
19 it is our intent to proceed expeditiously as ordered by
20 this Court, by the Court and Judge Barclay, to reconsider
21 our decision in light of the evidence and testimony.

22 Before we begin, I also have a couple other things
23 we want to address. We have a request from Alan Lilly
24 dated May 30th, 2003, which I believe was served on all
25 parties. The first request of Mr. Lilly's letter concerns

1 the staff assigned to assist State Board in this
2 proceeding. In addition to the three former current Board
3 staff members to whom YCWA previously objects, Mr. Lilly's
4 letter of May 30th objects to the continued involvement of
5 Dan Frink as the Board staff attorney for this hearing.

6 The basis of this objection appears to be that
7 Mr. Frink previously consulted Assistant Chief Counsel
8 Andrew Sawyer on matters related to Decision 1644. Mr.
9 Sawyer served as Mr. Frink's supervisor. In essence the
10 argument is that Mr. Sawyer had a conflict of interest as
11 alleged by Mr. Lilly in Mr. Frink's previous work with
12 Mr. Sawyer resulted in Mr. Frink also having a conflict of
13 interest.

14 After considering this, I will read my response as
15 to that request. First, although Mr. Lilly has made
16 various allegations neither the Board nor the Court has
17 determined that Mr. Sawyer or any other staff member has a
18 conflict of interest in this matter. The Board will
19 examine the conflict allegations in depositions of three
20 staff members as directed by the Court. The no conflict
21 of interest has been established at this time. Mere
22 allegations of bias do not disqualify persons with
23 assisting in an adjudicatory proceeding.

24 Second, Mr. Frink now works primarily on water
25 quality matters. Mr. Sawyer is no longer his supervisor.

1 Mr. Sawyer will not be involved in the present proceeding
2 or in preparing or reviewing a proposed order following
3 this hearing.

4 Third, if the prior association of Mr. Sawyer was
5 sufficient to cause a conflict of interest, then all the
6 Board's water right attorneys and many other staff would
7 be disqualified. That certainly is not the law as we read
8 it.

9 And finally, the Board's proceedings are conducted
10 pursuant to applicable provisions of the Government Code
11 and California Code of Regulations as specified in the
12 hearing notice. There is nothing in this proceeding that
13 requires disqualification of Mr. Frink in assisting the
14 Board in this proceeding.

15 Mr. Lilly's second request asked that I identify the
16 supervisors of staff members assigned to the hearing team
17 and all staff with whom the Board may consult regarding
18 this proceeding. For the record, Mr. Frink's supervisor
19 in this matter is Chief Counsel Craig Wilson. Mr. Mona's
20 supervisor is Lewis Moeller and Mr. Fecko's supervisor is
21 Gita Kapahi.

22 I understand staff has provided a copy of the most
23 recent organizational chart that identifies the Board
24 management and other staff. There is no legal requirement
25 to identify all staff within the Board may discuss the

1 water right proceeding nor to specifically identify all
2 staff members the Board members may speak to regarding
3 this matter.

4 The third item addressed in Mr. Lilly's letter asked
5 if the attachments to the three depositions identified as
6 staff list of exhibits will be included in the record.
7 The answer is yes. The Board will treat attachments as
8 part of the depositions and they will be included in the
9 record.

10 Finally, Mr. Lilly asked about the color figures
11 attached to Mr. Bratovich's declaration. Currently the
12 copies that were distributed with the hearing notice are
13 black and white, I believe. You have since discussed this
14 with our staff, and you are providing color copies for the
15 other parties. We appreciate your help in those matters.

16 At this time I would ask Mr. Frink to cover any
17 procedural issues and introduce the staff exhibits.

18 MR. FRINK: Good morning, Mr. Baggett and Mr.
19 Carlton. I was going to mention Esther Schwartz is the
20 Court Reporter and is present to prepare a transcript of
21 the hearing. Anyone who wants a copy of the transcript
22 should make arrangements with Ms. Schwartz.

23 As explained in the hearing notice, Yuba County
24 Superior Court directed the State Board reconsider
25 Decision 1644 in light of the evidence and several

1 specified documents. Notices of Intent to Appear indicate
2 that Yuba County Water Agency and the South Yuba River
3 Citizens League and associated organizations intend to
4 present witnesses regarding some of the documents
5 identified by the Court. In order to ensure that the
6 documents referenced by the Court are included in the
7 record, we went ahead and identified those documents as
8 Staff Exhibits 1 through 7, as listed on the attachment to
9 the hearing notice. And, again, to ensure that the
10 documents are included in the record, I would request,
11 Mr. Baggett, that Staff Exhibits 1 through 7, including
12 the attachments to those documents, should be accepted
13 into evidence at this time.

14 CHAIRMAN BAGGETT: I think no objection since
15 this was ordered by the Court. I would --

16 MR. MINASIAN: This may be the appropriate
17 time to raise a procedural issue in regard to the three
18 depositions.

19 CHAIRMAN BAGGETT: Okay.

20 MR. MINASIAN: For the record, my name is Paul
21 Minasian. I am representing South Yuba Water District,
22 Cordua Irrigation District and Brophy Water District's
23 counsel, Jesse Barton, is here and he may join in the
24 comments.

25 Basically, you're put in an unusual situation in

1 which the Court indicated you could use the depositions.
2 Your rules and regulations in regard to taking evidence
3 and making determinations, however, provide a right of
4 cross-examination. A deposition is usable only if the
5 parties are unavailable. We will be denied the right of
6 cross-examination of these three witnesses if you
7 incorporate the depositions, but do not provide the
8 witnesses. So we would like to preserve the record. In
9 that regard that is not a problem you're causing at this
10 point. But if you attempt to determine the issue of bias
11 or infection of your process on the basis of those three
12 depositions without a right of cross-examination, your
13 decision will not be entitled to the substantial evidence
14 test and deference.

15 Thank you.

16 MR. FRINK: Mr. Baggett, I would like to
17 comment briefly on that.

18 Mr. Minasian and counsel for all of the other
19 parties who were involved in the litigation were noticed
20 of the depositions. They knew that the reason that
21 Mr. Lilly had asked to take the depositions concerned his
22 allegations of bias. So it isn't an instance of Mr.
23 Minasian or other attorneys not having the opportunity to
24 cross-examine the witnesses. It is just the instance of
25 they choosing not to do so.

1 In view of that and in view of the fact that the
2 Court directed us to take the depositions into evidence, I
3 don't see there is a problem here.

4 I did have one additional point. This may go
5 without saying. But since this is a remand from the
6 Superior Court, I suggest that the Board simply announce
7 it takes official notice of the court records and all the
8 litigation involved in the Board's Yuba River proceedings
9 that led to adoption of Decision 1644. This isn't to say
10 that you would be taking official notice of the truth of
11 the matter asserted in all those documents, but simply
12 that the documents have been filed in the courts involving
13 this matter and that way the documents would not have to
14 be resubmitted.

15 MR. BRANDT: Mr. Chairman, Alf Brandt for the
16 Department of the Interior. I just want to say just so
17 the record is clear, we did not get notice of those
18 depositions because we are not involved in the State Court
19 litigation. Nevertheless, Department of the Interior
20 waives any right to cross-examination. So if you want to
21 consider this, we support you in considering whatever you
22 want to do and put whatever weight you view on that.

23 CHAIRMAN BAGGETT: Thank you.

24 We will admit -- with objection noted we will admit
25 the admission of the court documents into the record as

1 well as Exhibits 1 through 7 as directed by the Court.

2 Before we begin the evidentiary presentation, I will
3 provide an opportunity for speakers to make a short
4 nonevidentiary policy statement regarding the issues
5 listed in hearing notice. I think we have two cards.

6 A nonevidentiary statement is subject to the
7 limitations listed in the hearing notice. Persons making
8 policy statements must not attempt to use the statement to
9 present factual evidence, either orally or by introduction
10 of written exhibits. I would ask that you keep your
11 comments to five minutes or less.

12 With that, we have Michael George.

13 MR. GEORGE: Mr. Chairman, we defer to the
14 opening statement.

15 CHAIRMAN BAGGETT: Michael Tucker, NOAA
16 Fisheries.

17 MR. TUCKER: Good morning. I just wanted to
18 say we did not have the time or the opportunity to put in
19 an official statement. I just wanted to put forth for
20 NOAA Fisheries that basically we stand by all of your
21 previous testimony in these matters and in the previous
22 hearings, and we feel that the new biological information
23 does not in way refute any of that testimony and that we
24 certainly support the Board in a speedy and expeditious
25 resolution of this issue.

1 THE COURT REPORTER: State your appearance for
2 the record, please.

3 MR. TUCKER: My name is Michael Tucker with
4 National Marine Fishery Service.

5 CHAIRMAN BAGGETT: Thank you.

6 With that we will now move to the presentation by
7 parties to this evidentiary portion of this hearing.
8 Would the people, presenting parties to the evidentiary
9 hearing, please state your name, address and whom you
10 represent so the Court Reporter can enter this information
11 into the record. If you have a card, you can give that to
12 Esther later, that would be appreciated.

13 First, Yuba County Water Agency.

14 MR. LILLY: Good morning, Mr. Baggett. I am
15 Alan Lilly, Bartkiewicz, Kronick & Shannon, Sacramento,
16 California, appearing for the Yuba County Water Agency.
17 And I don't know if you're getting into the order of
18 proceeding, but I just wanted to let you know Mr. Bonham
19 asked to go before us because he has a witness with a
20 schedule conflict. And I told him that was okay with me.
21 I just thought I would let you know that.

22 I think I was supposed to state my address, too.
23 You told me to and I forgot. 1011 Twenty-Second Street,
24 Sacramento, California 95816.

25 CHAIRMAN BAGGETT: Thank you.

1 South Yuba River Citizens League and other public
2 interest groups.

3 MR. BONHAM: Good morning. My name is Chuck
4 Bonham. I am with Trout Unlimited. My address is 828 San
5 Pablo Avenue, Suite 208, Albany, California 94706. I am
6 appearing on behalf of a collection of conservation groups
7 which include the South Yuba River Citizens League,
8 California Sportfishing Protection Alliance, Friends of
9 the River, Bay Institute, as well as Trout Unlimited.
10 Also appearing with me is Mr. Todd Hutchins who is the ne
11 River Law Director for the South Yuba River Citizens
12 League. He will assist on certain matters today.

13 CHAIRMAN BAGGETT: Thank you.

14 So you have a witness that you would like to be the
15 first to present. I was going to do opening statements
16 first of all the parties.

17 MR. BONHAM: We would prefer opening. And then
18 once we move the key hearing issue, perhaps key hearing
19 Issue No. 4 first.

20 CHAIRMAN BAGGETT: Browns Valley Irrigation
21 District.

22 MR. BEZERRA: Thank you very much,
23 Mr. Baggett. My name is Ryan Bezerra for Browns Valley
24 Irrigation District. Bartkiewicz, Kronick & Shannon, 1011
25 Twenty-Second Street, Sacramento, California 95816.

1 CHAIRMAN BAGGETT: Thank you.

2 Brophy Water District.

3 MR. BARTON: Good morning. Jesse Barton, Law
4 Office of Dan Gallery, 926 J Street, Suite 505,
5 Sacramento, CALIFORNIA 95826.

6 CHAIRMAN BAGGETT: South Yuba Water District
7 and Cordua Irrigation District.

8 MR. MINASIAN: Paul Minasian, 1681 Bird
9 Street, Oroville, California, representing South Yuba
10 Water District, Cordua Irrigation District. And the firm
11 is Minasian, Spruance, Baber, Meith, Soares & Sexton.

12 CHAIRMAN BAGGETT: California Department of
13 Fish and Game.

14 MR. CUNNINGHAM: Morning, Mr. Chairman.
15 William Cunningham, Deputy Attorney General, 1300 I
16 Street, Sacramento, California. Here on behalf of the
17 Department of Fish and Game.

18 CHAIRMAN BAGGETT: Department of the Interior.

19 MR. BRANDT: Good morning, Mr. Chairman. Alf
20 W. Brandt, Department of the Interior, Office of the
21 Regional Solicitor, 2800 Cottage Way, Sacramento 95825,
22 for the Department of the Interior.

23 CHAIRMAN BAGGETT: Western Water Company.

24 MR. MORRIS: Good morning, Chairman Baggett
25 and Board Member Carlton. I am Scott Morris with Kronick,

1 Moskowitz, Tiedemann & Girard, 400 Capitol Mall, 12th
2 Floor, Sacramento 95814, representing Western Water
3 Company. And with me today is Michael Patrick George who
4 is the president of Western Water. He will make the
5 opening statement for us this morning.

6 CHAIRMAN BAGGETT: Thank you.

7 Last, Western Aggregate.

8 Western Aggregate.

9 MR. FRINK: I don't believe Mr. Mills is here
10 yet.

11 CHAIRMAN BAGGETT: Before we proceed with the
12 presentation of testimony, a representative of each party
13 may make a brief opening statement, summarizing their
14 positions in this matter with respect to the key issues in
15 the hearing notice. After the opening statements we will
16 hear testimony from Yuba County Water Agency regarding
17 documents they have asked to be included in the record.
18 Witnesses who have submitted a written declaration should
19 identify the written declaration as their own and affirm
20 that it is true and correct. Witnesses should then
21 summarize the key points in the written testimony and
22 should not read the declaration into the record and should
23 not discuss matters not covered in that declaration.

24 Following the oral summaries the witnesses
25 presented by Yuba County Water Agency will be available

1 for cross-examination as a panel by representatives of the
2 other parties, Board staff and Board Members. Redirect
3 testimony and recross will be limited to scope of the
4 redirect testimony. That will be permitted.

5 At this point we will allow South Yuba River
6 Citizens League actually to do their evidence first and
7 then we will move to Yuba County Water Agency. I realize
8 that the witness appearing for South Yuba River Citizens
9 League in response to a subpoena, that I asked counsel for
10 South Yuba River Citizens League to present the direct
11 testimony on energy matters in 15 minutes, if possible.
12 That testimony will also be subject to cross, redirect and
13 recross, if necessary.

14 Parties are encouraged to be efficient in presenting
15 their case and in cross-examination. Unless I approve a
16 variation, we will follow the procedure set forth in the
17 Board's regulation and the hearing notice. Parties'
18 presentations are subject to the following time limits.
19 And I recognize we didn't have the opportunity for a
20 prehearing, so we couldn't, I guess, tighten up some of
21 these rules, I guess.

22 Before I announce the times, just don't feel
23 obligated to use all the time allotted. I think the real
24 action, if you will, here and the part of greatest
25 interest to Gary and myself will be cross-examination and

1 rebuttal testimony, if any. I think the evidence is
2 pretty clear; it is already in the record as ordered by
3 the Court. So if we are going to spend extra time, that
4 is the place where I think most of you would agree would
5 be the most use in our reconsideration.

6 So the times as stated in the notice would be
7 limited to: opening statement, 15 minutes;
8 cross-examination for each panel will be limited to 30
9 minutes by each party or attorney; and additional time for
10 cross on the showing of good cause will be considered.

11 With that, let's begin with opening statements.
12 Yuba County Water Agency, you're up, Mr. Lilly.

13 MR. LILLY: Mr. Baggett, just a few minutes ago
14 after you asked for policy statements Tib Belza, the
15 Chairman of the Yuba County Water Agency Board of
16 Directors, appeared, and he would like to make a brief
17 opening policy statement, if he can do that before my
18 opening statement.

19 CHAIRMAN BAGGETT: That is fine.

20 MR. LILLY: Thank you.

21 MR. BELZA: Good morning. I am Tib Belza,
22 5363 Marysville Road, Browns Valley, California, the
23 current chairman of Yuba County Water Agency.

24 Chairman Baggett and Member Carlton, I come before
25 you here this morning to urge you to take the seriousness

1 of this new evidence that has come forth now. As you
2 know, we have stated in the past this is critical for not
3 only water agency's operation and the people of Yuba
4 County, but as you know our economy is basically an
5 ag-based economy, and this water, of course, is vital for
6 that future to continue.

7 There has been lots of discussion and lots of
8 comments that have been made and are going to continue to
9 be made. Some of the things have been constant
10 throughout. In the last ten to 12 years when these
11 hearings started, we have had new management change in
12 Yuba County Water Agency. We've had new Board Members.
13 You've had Board Members change. But some of the things
14 remain constant; and that is our commitment to providing
15 the water resources to our region and also doing it in a
16 manner that helps with fishery and helps the environment
17 in general.

18 We have been in what has been a combative situation,
19 and we have continued to work closely with the fishery
20 agencies and everyone else involved. We continue to make
21 that commitment. And we hope that you will take this into
22 consideration when you look at this. It is a complicated
23 matter, a lot of information to cover. And we just urge
24 that you can look at this with a new, fresh outlook and
25 give it serious consideration and vacate 1644 and let us

1 continue to work proactively and in a cooperative manner
2 and continue.

3 The other constant that has remained throughout this
4 is our fishery is thriving, is doing well, and we want to
5 work, continue to work with the other groups to keep this
6 in same good order.

7 Thank you very much.

8 CHAIRMAN BAGGETT: Thank you.

9 MR. LILLY: Good morning, Chairman Baggett,
10 Member Carlton, members of the staff. As I said before, I
11 am Alan Lilly representing the Yuba County Water Agency.
12 I didn't introduce him before, with me at the table is
13 Yuba County Water Agency's General Manager, Curt Aikens.

14 In the interest of time and as, in fact, encouraged
15 by the hearing notice, we are not going to ask for live
16 testimony from the three people whose depositions were
17 taken before, and we accept the Board's process of just
18 submitting those deposition transcripts and associated
19 exhibits into evidence. I just will very briefly
20 summarize the three deponents.

21 First of all, as the Board Members may be aware,
22 Mike Mainz had an extensive career with California Fish
23 and Game for 16 years, including significant work on
24 salmon and steelhead habitat studies in the Lower Yuba
25 River and American shad in Sac Valley before he went to

1 the State Board. And then over his objection he was
2 required by his management, his supervisors at the State
3 Board to then evaluate all the evidence during the 1992
4 hearing and prepare the 1994 staff report.

5 And we just don't think that it was possible for him
6 to be in an impartial position after having worked for all
7 those years for Fish and Game on this project.

8 The situation with Alice Low was similar. She also
9 worked for Cal Fish and Game for many years, and then she
10 worked as a consultant to U.S. Fish and Wildlife Service
11 before her work with the State Board. During her prior
12 work she was involved with projects which Department of
13 Fish and Game and U.S. Fish and Wildlife Service
14 developed, recommended, instream flow requirements for the
15 Lower Yuba River. And that after that she came to the
16 State Board and was the environmental specialist for the
17 2000 hearing and confidentially advised the Board Members
18 in the process that they used to reach D-1644.

19 Mr. Sawyer, throughout the entire 11-year period
20 that the State Board was involved in the Lower Yuba River
21 proceeding was a member of the Board of Directors and, in
22 fact, the chairman of that Board of Directors for four
23 years and was also chairman of the Legal Affairs Committee
24 for that entire time and chairman of the political
25 committee of the Mother Lode Chapter of Sierra Club, which

1 at the same time was a party to the Lower Yuba River
2 proceeding asking for higher flows.

3 Mr. Sawyer was the Assistant Chief Counsel for Water
4 Rights, was supervising Mr. Frink, as Mr. Baggett has
5 pointed out, as was confidentially advising the Board.

6 We submit that this just sets up a situation where
7 the Yuba County Water Agency could not have a fair hearing
8 when there were parties with these connections -- excuse
9 me, when there were State Board staff members
10 confidentially advising the Board when they had such
11 connections with other parties.

12 Therefore, we will ask at the end of this proceeding
13 for the State Board to vacate D-1644 and start a new
14 process. I don't think the new process will have to take
15 as long or be as involved as the prior process because we
16 have learned a lot more and the evidence can be more on
17 point. Frankly, with this Mainz staff report on, the
18 process was infected with bias and the staff report led to
19 the 1996 draft decision which was the basis for the 2000
20 hearing, and many parts of it, in fact, were included in
21 D-1644.

22 So it is not a case where a couple Band-Aids can be
23 put on top of the problem. It is more serious than that.

24 The second reason why we are asking the State Board
25 to vacate D-1644 is that there has been significant new

1 evidence since the decision was adopted in March of 2001.
2 First, the annual populations of the adult chinook salmon
3 in the Lower Yuba, which had risen post project after the
4 Yuba River Project was built, through the hearing have
5 continued to rise. And we think that this is particularly
6 important when, among other things, D-1644 is somewhat
7 equivocal, and at most says the populations have been
8 stable. And frankly, it really draws into question the
9 whole reason for this proceeding.

10 If there is not a problem, what are we trying to fix
11 here? And that we believe with these -- particularly with
12 the last three years of higher salmon counts, which is the
13 principal indicator of the fishery in the Lower Yuba River
14 demonstrate that the Board really needs to go back and
15 evaluate why it is doing anything here, at least so what
16 is the appropriate thing to do.

17 Regarding the actual requirements in D-1644,
18 probably the most disputed requirements of all were those
19 for the spring period, April 21st through the end of June,
20 spring and early summer. And I will just quote two
21 sentences from D-1644.

22 The first on Page 61. It says:

23 The primary fishery consideration in the
24 April through June period is to provide
25 adequate flows for juvenile chinook salmon

1 and steelhead migration. (Reading)

2 And then on the next page D-1644 states:

3 However, the record indicates that the
4 emigration of juvenile chinook salmon from
5 the Lower Yuba River begins in late April,
6 peaks in May and normally is completed by
7 the second week in June. (Reading)

8 Now data from the rotary screw traps which were
9 installed just before the 2000 hearing, and there was only
10 limited data available during the 2000 hearing. We now
11 have three years of data from those screw traps, and they
12 just show that those findings were incorrect. This
13 happens. We have much more evidence than he would have
14 had before. And they show, regarding the salmon, 98 to 99
15 percent of the salmon leave the Lower Yuba River before
16 April 21. And regarding the steelhead, less than 15
17 percent migrate during that period. The rest migrate
18 either before or after that period.

19 So we submit this new evidence draws into
20 significant question whether those fringe flow
21 requirements really are appropriate since the stated basis
22 for them is for fish that are not even in the river at
23 that time.

24 Third and finally, regarding the demands. The
25 D-1644 contains the following statements about the Dry

1 Creek Mutual Water Company and the Wheatland Water
2 District, which are areas in southern Yuba County that had
3 historically not received Yuba River water, but which the
4 Yuba County Water Agency has been developing facilities so
5 that they can eliminate the problems of groundwater
6 overdrafts in those areas.

7 And D-1644 states at Page 107:

8 The record remains unclear as to when and
9 if projected demands for surface water in
10 the Wheatland and Dry Creek areas will be
11 reached. (Reading)

12 And as result of this statement the hydrological
13 analysis that are described in D-1644 in determining the
14 impacts on the water supplies for Yuba County Water Agency
15 water users as a result of the D-1644 instream flow
16 requirements do not include any demand for either the
17 Wheatland area or the Dry Creek area. Now Mr. Aikens will
18 testify that Dry Creek already has almost all of the
19 facilities needed to receive its full projected demand of
20 16,000 acre-feet per year, and currently it is already
21 12,000 and within the next few years it will continue to
22 grow to the full amount.

23 And regarding the Wheatland area, that project has
24 received a major boost when it got a grant from the
25 Department of Water Resources for over \$3,000,000, which

1 is approximately half of the project costs. And there
2 are, in fact, financing mechanisms for the rest.

3 Again, this decision, based on new evidence since
4 the D-1644 was adopted, has just turned out that this
5 finding is incorrect. And because it is such a critical
6 finding for the decision, it requires the State Board to
7 evaluate the decision.

8 Finally, I will just mention regarding the
9 California Energy Commission evidence and Issue No. 4 in
10 the Board hearing notice, we believe that the evidence
11 will demonstrate that the California electricity situation
12 is not in fact so well resolved now that the interim flow
13 requirements should be replaced with the long-term
14 requirements. In fact, the indications are that the
15 electricity problem will continue in California for many
16 years. And frankly that the long-term requirements with
17 the associated reductions in summer power generation from
18 this project should not go into effect.

19 So with that, I appreciate the time, and we look
20 forward to the hearing.

21 CHAIRMAN BAGGETT: Thank you.

22 South Yuba River Citizens League.

23 MR. BONHAM: Good morning, Chairman, Board
24 Member Carlton and other Board Members, as well as
25 interested parties today. As I mentioned, my name is

1 Chuck Bonham. I represent a collection of conservation
2 groups previously identified. Mr. Todd Hutchins will
3 assist once the supplement hearing moves to Key Issues 2
4 and 3.

5 I would like to take a brief moment and address a
6 preliminary remark that is responsive to the Chairman's
7 opening welcome. We hear the Board's openness as to
8 negotiated settlement as a way to proceed here. We are
9 also open to such a concept so long as there is real
10 progress being made.

11 I would like to turn to the questions presented at
12 this supplement hearing. The questions presented as key
13 issues in this supplement hearing are narrowly tailored
14 and easily answered. The evidence related to the four
15 supplemental key hearing issues establish the following
16 main point: There is only one issue and one piece of
17 evidence that warrants reconsidering and revising Decision
18 1644. That one piece of evidence is the California Energy
19 Commission report and accompanying press release to the
20 California Senate Energy Committee on January 28, 2003.
21 That one piece of evidence is distinguishable from all
22 other evidence in this supplement hearing because it goes
23 to the very heart of the Board's interim instream
24 requirements within Decision 1644. No other piece of
25 evidence in this supplement hearing goes as directly or as

1 dispositively to a key issue so identified.

2 In short the answer is a resounding, yes, Decision
3 1644 should be revised based on the evidence regarding
4 present and future electrical energy supply and demand
5 conditions in the Energy Commission report. That report
6 is reliable. That report is -- this states expert
7 commission's conclusion. No other question presented or
8 key issue in this supplement hearing can be identified in
9 the affirmative.

10 I would like to briefly discuss the relationship
11 between these main points and Key Issue 4 before the
12 Energy Commission Report.

13 The Energy Commission has the legislative mandate to
14 forecast statewide energy needs and supply. It is this
15 state's principal energy forecasting entity. On January
16 28 of 2003, the then executive director of the Energy
17 Commission, a Mr. Steve Larson, presented Energy
18 Commission analysis and conclusions in the form of a
19 report to the California Senate Energy Committee regarding
20 California's electricity supply going forward. That was
21 an official act. The title of the accompanying press
22 release was in the report, and I am quoting, Energy
23 Commission Predicts Promising Electricity Supply and
24 Demand for Next Five Years.

25 Most importantly that conclusion goes two years

1 beyond the expiration date of Decision 1644's interim
2 flows. The Energy Commission subsequently published and
3 posted to its official website this report in secure PDF
4 format. I underscore the logic here is straightforward.
5 During this supplemental hearing, conservation groups will
6 call a knowledgeable witness from the Energy Commission to
7 testify regarding the Energy Commission report and to
8 authenticate and summarize the information in that report.
9 This witness will testify under oath. This witness will
10 be available for cross-examination.

11 Then the State Water Resources Control Board should
12 revise Decision 1644 to strike the interim flow
13 requirements and immediately implement the Decision's
14 long-term flow requirements. The reasons for that
15 revision are simple and overwhelming. There are three.

16 First, the but for proximate cause of the Decision
17 interim flow requirements was the 2000 energy crisis and
18 the Water Board's concern going forward about that crisis.
19 In fact, the State Water Board admits this singular causal
20 link. I would refer parties and the Board to the Decision
21 Page 174. I quote from the amending order at Page 8:

22 In the absence of the current power
23 shortage situation the State Water
24 Resources Control Board would not have
25 established interim instream flow

1 requirements. (Reading)

2 Yet at the same time the State Water Board fully
3 recognized and comprehended that the Decision's long-term
4 flow requirements impact on power production, quote, would
5 be minimal. I refer the interested parties as well as the
6 Board to the amending order Pages 3, Pages 7, Pages 8 and
7 Pages 11 as well as to Appendix IV of the Decision.

8 The second reason for revision. If the possibility
9 of a power shortage is materially less or nonexistent,
10 there is no logical reason, basis or justification for
11 maintaining the interim flow requirements. The question
12 is not whether there was an energy crisis in the year
13 2000. Rather the only question relevant today during this
14 supplement hearing is whether there is a basis for the
15 interim flow requirements.

16 The third reason for revision. The California
17 Energy Commission report clearly shows no basis exists for
18 the interim flow requirements through 2006. A plain
19 reading of the report shows no basis exists.
20 Notwithstanding, the Energy Commission staff's own
21 recognition of the inherent uncertainties in any
22 forecasting exercise.

23 No subsequently published Energy Commission report
24 contradicts this finding. It only makes common sense that
25 events or information indicating the truth or, in fact,

1 the falsity of agency justification should not be ignored.

2 Our request for revision based on materially new
3 information is not novel. It is nothing to be afraid of.
4 The Board already has and always maintains as a general
5 matter across its entire regulatory domain the ability to
6 reconsider a decision through its reserved authority.
7 This option is always open to all interested parties. We
8 do not question at all here today the wisdom of the
9 Board's concern about the energy situation in 2000. None
10 of us have the power to undue the past. Analyzing that
11 would be that futile exercise. However, justice should
12 look forward from today and not turn a blind eye at this
13 stage of these very long proceedings when information and
14 events have matured to the point that the fundamental
15 reason for a decision may no longer exist.

16 Unlike information which is merely additive to the
17 existing record, for example fish spawning survey or fish
18 migration monitoring results, the California Energy
19 Commission report is of truly new and revolutionary
20 consequence to this decision.

21 Turning briefly, very briefly, to Key Issues 1, 2
22 and 3. First, the depositions of former and present Board
23 Member staff do not present evidence or unfair -- evidence
24 of unfair hearing or denial of due process in any of the
25 proceedings leading up to Decision 1644. Such accusations

1 are flatly wrong. Put simply, Yuba County Water Agency
2 has had 15-plus years of its day in court regarding
3 fishery measures on the Lower Yuba River.

4 Second, the so-called new fishery evidence in
5 the Mitchell and Bratovich declarations and new water
6 supply and demand evidence in the Aikens declaration is
7 not new. It does not warrant revising the Decision. It
8 is simply redundant of evidence already in the
9 administrative record. The State Water Board has heard
10 such evidence. It has already heard the arguments related
11 to that evidence. It balanced those issues already. No
12 further action is needed.

13 By way of conclusion I wish to make a few brief
14 policy oriented statements.

15 The United States Ninth Circuit Court of Appeals
16 once famously remarked that water litigation is a weed
17 that flowers in the arid west. The sad fact on the Lower
18 Yuba River that proceeding to save salmon and steelhead
19 have now run past 15 years in length. The water
20 litigation weed continues to flourish in this basin.
21 Namely, the contested effort to address fishery needs in
22 this basin continues while the salmon and steelhead remain
23 threatened with extinction. Once extinct, the game is over
24 for these public trust resources.

25 The State Water Board, frankly, got it right in

1 Decision 1644 when it found that it has the
2 constitutional, statutory and public trust authority,
3 indeed, obligation to better plan, manage and allocate
4 water in this state for the protection of fish. For over
5 15 years in the Yuba the salmon and steelhead have
6 suffered from the historical imbalance that favored
7 consumptive water use over fishery needs.

8 In sum, the single basis for the Decision's interim
9 instream flow requirements no longer exist. The
10 California Energy Commission report shows that. Striking
11 the interim flows and implementing the long-term flows
12 moves us towards protecting those fish. The only key
13 issue that can be answered with an affirmative yes in this
14 supplement hearing is Key Issue No. 4.

15 Thank you.

16 CHAIRMAN BAGGETT: Brophy Water District.

17 MR. BARTON: Jesse Barton for Brophy Water
18 District. We will defer to Paul Minasian.

19 CHAIRMAN BAGGETT: Thank you.

20 Browns Valley Irrigation District.

21 MR. BEZERRA: Thank you very much, Chairman
22 Baggett and Board Member Carlton. Again, my name is Ryan
23 Bezerra for Browns Valley Irrigation District. And
24 primarily I would just like to join the comments of Alan
25 Lilly for Yuba County Water Agency, but with two simple

1 additions to those comments. And that is in relation to
2 the fishery evidence concerning the adult populations of
3 salmon in the Lower Yuba River and the increased demands
4 of Dry Creek Mutual Water Company and Wheatland Water
5 District, the evidence could be put on here that this
6 simply confirms projections that were put for the 2000
7 hearing that D-1644 did not agree with.

8 This evidence simply confirms those projections and
9 demonstrates that, one, the salmon population in the Lower
10 Yuba River has, in fact, increased since the project came
11 on line. And two, that the Dry Creek and Wheatland will
12 have increased demands. These are points that D-1644 did
13 not agree with and this evidence demonstrates that the
14 findings that did not agree with those projections were,
15 in fact, incorrect.

16 This new evidence, therefore, justifies the vacation
17 of the long-term flows. And at that point I would just
18 like, again, to agree with the comments of Mr. Lilly.

19 Thank you very much.

20 CHAIRMAN BAGGETT: Thank you.

21 Now South Yuba Water District.

22 MR. MINASIAN: Mr. Chairman, as an opening
23 statement and as an offer of proof let me suggest to you
24 what South Yuba Water District and Cordua Irrigation
25 District and to the extent Brophy Water District wishes to

1 incorporate our comments will be first, the dignity of the
2 Board and the respect of the Board in the state of the
3 California is critical to the functioning of the water
4 rights system. So it is in your hands. Neither of the
5 officers who are present today I am sure would be able to
6 affirm that they have read and considered all of the
7 evidence and the exhibits in the 1990 hearing and in the
8 2000 hearing.

9 We have a legal position on that. We've expressed
10 that in our brief in Yuba County, and I will express it
11 briefly today, just to preserve it.

12 But the critical point today is you have in your
13 hands the question of whether or not due process, fairness
14 occurred in those hearings. And so at the appropriate
15 time, because the three deponents are not present, I will
16 take extracts from the record and try to show you how
17 critical it is that you simply rescind the Decision. To
18 the extent that you are judges you must know the evidence,
19 you must know the procedure in order to have an order
20 which meets due process and the concept of fairness.

21 And the only way you can do that in this particular
22 circumstance is to rescind the whole of the order and take
23 the record and acquaint yourselves with it, and then make
24 a Decision after extracting from that process those
25 possible affects which have infected your decision and

1 infected the potential respect of the state of California
2 for that decision.

3 Thank you.

4 CHAIRMAN BAGGETT: Thank you.

5 California Department of Fish and Game.

6 MR. CUNNINGHAM: Thank you again. Good
7 morning, Chairman Baggett, Member Carlton. Bill
8 Cunningham for the Department of Fish and Game. We have
9 been at this for some time. Apparently we are going to be
10 here for some time more. Hopefully not that much today.
11 I will be aware of Mr. Baggett's clock watching on our
12 participation as well as that of all other parties. We
13 would like to give a brief opening statement. It will
14 incorporate some elements of policy as well, but I will
15 try to keep it short as it is.

16 As you recall from our past participation we would
17 again like to remind the Board that the Department of Fish
18 and Game is here as the trustee agency for California's
19 fish and wildlife. It's long been recognized in
20 California that fish and wildlife are a unique species of
21 property in which the ownership resides in the public.
22 The Department of Fish and Game serves as an agency that
23 attempts to protect those fish and wildlife. This Board
24 has a unique role in aiding in that same protection of
25 fish and wildlife.

1 It was established long ago that this Board can
2 evaluate water rights and water rights decisions in
3 California to assure that the use of the water will
4 provide protection for those native trustee resources,
5 fish and wildlife. The Board is reminded of this some
6 years ago by a Supreme Court ruling in the National
7 Audubon Society case. But the court I think assumes this
8 decision was taken to heart. The Board apparently took it
9 to heart and worked hard since to provide protection for
10 California's fish and wildlife.

11 We suggest that same Board effort continue. We
12 would also like to remind this Board that that Board's
13 separate authority was buttressed by separate Fish and
14 Game Code sections. For example Sections 3927, which
15 provides for keeping fish in good condition below any dam,
16 obstructing water resources within the state of
17 California, and that those -- that provision is also again
18 buttressed by other provisions both in federal and state
19 law dealing with the protection of threatened and
20 endangered species. Specifically in the Yuba River
21 watershed the listings of both spring-run chinook and
22 Central Valley steelhead bring those endangered species
23 acts to the forefront.

24 With this in mind, we would again like to ask this
25 Board to reaffirm its earlier commitment to the protection

1 of Fish and Game resources while at the same time perhaps
2 casting a rather cynical eye to the new testimony being
3 provided by Yuba County Water Agency. We would like to
4 suggest to this Board that the new testimony being
5 provided by both Messers. Mitchell and Bratovich as
6 biologists is both cumulative and perhaps not exactly what
7 it at first blush seems.

8 We are prepared to present rebuttal testimony
9 pointing out that there are significant differences of
10 opinion as to the conclusions actually being reached by
11 testimony by both Mr. Mitchell and Mr. Bratovich
12 suggesting that, while there are, yes, runs of fall-run
13 chinook salmon on the Yuba River, that those runs are not
14 significantly increasing; in fact, increasing at a lesser
15 rate than preproject fisheries had increased in the past.

16 We would also like to suggest that the attempts to
17 analyze subsequent rotary screw trap data to establish
18 that there are juvenile chinook salmon outmigrants routine
19 and leaving the system at an early time in every calendar
20 year and erroneously uses the data available as a
21 conclusion that cannot be supported by the information
22 currently presented for the evidence.

23 Then we would like to also suggest that the
24 testimony of Mr. Aikens goes to nothing more than an
25 affirmation of what he already claimed was going to happen

1 three years ago, that there was going to be additional
2 water development, and now he is offering testimony, well,
3 yes, water development is proceeding. I think that this
4 Board took that into consideration and has already acted
5 in response to that.

6 I suggest that this Board need do nothing more.

7 Finally, we would like to have, however, encourage
8 the Board to take a little more aggressive look at
9 information provided by SYRCL and the California Energy
10 Commission. As this Board will recall, the decision to
11 provide an interim flow for the Yuba River Project for an
12 extended period of time, approximately five years, was
13 reached at the very last minute in the prior proceedings,
14 and it was reached based upon a rather summary conclusion
15 that an energy crisis had hit California and that the need
16 to ensure constant generation for at least a significant
17 period of time was important. Those were essentially
18 locked in at a lower level than perhaps the fisheries
19 required. But the give and take was to assume that
20 California's need for energy would subsequently at least
21 receive some additional boost from these reduced flows.

22 It turns out that while we may have been accepted
23 that in an excess of caution that may not have been
24 necessary and I suggest that at least as of today it is
25 not necessary. Those interim flows were designed to

1 perhaps save us from an energy crisis that no longer
2 appears quite so imminent. And I would suggest that
3 information as to that energy crisis should be accepted by
4 this Board, should be used in evaluating those interim
5 flows and should suggest that the interim flows perhaps at
6 this point in time be dismissed.

7 What I would also like to suggest, respectfully at
8 the end of this, is that we remain committed to the
9 protection of fish and wildlife resources in the Yuba
10 River. We hope this Board has the commitment. We would
11 like to suggest that Decision 1644 was a reasonable
12 effort. Although we may not have agreed with all of its
13 substance, we did agree with its intent and we would
14 encourage the adoption or readoption of similar terms of
15 Decision 1644 in whatever this Board now proposes.

16 We would like to again suggest that whatever action
17 this Board takes this Board take it as expeditiously as
18 possible. We, among others, are involved in the
19 litigation that has recently terminated, and we remain
20 concerned that should there be a break now in the
21 effective terms of Decision 1644 without something else in
22 its place, that the possibility for mischief in flow
23 management are high.

24 So we encourage this Board to arrive at some quick
25 decision, that I think this Board can arrive at that

1 decision with little additional consideration of what we
2 consider cumulative evidence, and that such a decision
3 should be immediately implemented. In alternative, may I
4 respectfully suggest that if this Board finds itself
5 unable to complete a decision making process in the
6 short-term that it consider implementation of some interim
7 flow. Though I use the word "interim" reservedly, not in
8 the context of the interim flows of the past, but in the
9 context of an absence of any flow restraints should the
10 time for adoption of a new decision go beyond an extended
11 period of time.

12 The trial court in this matter provided a certain
13 period of time to respond to its Writ of Mandate. I think
14 for whatever reasons it was an unusual number, 66 days.
15 The time for even -- I haven't got a clue of how he got
16 there. I think also that the decision to the extent that
17 this Board could or would wish to appeal it to the Third
18 District Court of Appeal, this Board is also looking at a
19 very narrow time window in which to pursue such an appeal.
20 If that time for appeal passes, if the time for the return
21 to the Superior Court lapses, Decision 1644 will cease to
22 exist and the only remaining flow protections in place
23 will revert to those contractual arrangements reached by
24 the Department of Fish and Game and Yuba County Water
25 Agency well over 30 years ago.

1 Please, whatever you do, make it expeditious.
2 Resolve this matter. If not, consider putting in place an
3 interim flow protection scheme. I would suggest most
4 respectfully and finally that there is a tried and true
5 interim flow scheme already developed. You spent 15 years
6 of hearings getting to it. You spent over 25 days
7 arriving at it, and months considering it. The terms of
8 D-1644 would simply also serve as an interim flow regime
9 pending resolution of any final matter here.

10 With that, thank you very much.

11 CHAIRMAN BAGGETT: Mr. Brandt, Department of
12 the Interior.

13 MR. BRANDT: Good morning, Mr. Chairman,
14 Member Carlton. The United States Department of the
15 Interior is not involved in the state court litigation as
16 a federal agency, but we do continue to have concerns
17 about the fishery on the Yuba River. For that reason we
18 are participating in the ongoing negotiations, settlement
19 negotiations and discussions in order to avoid any further
20 litigation or delay right now in the current litigation.

21 And if I understand that Yuba County Water Agency
22 has proposed a stay, I am not sure after hearing this
23 morning I think that may be in effect what they propose by
24 saying vacation and then start up a whole new hearing
25 process, it is going to take a long time. We spent a

1 decade, and it's going to take even longer to get one
2 started again and start all over again.

3 Interior considers the settlement negotiations and
4 your proceeding and the state court proceedings as a
5 separate parallel and independent process. We signed a
6 confidentiality agreement to make sure that what goes in
7 the settlement doesn't come in here, doesn't come into the
8 state court litigation. We all agreed to separate those,
9 make that separation. We don't think that it makes sense
10 and we do now tie these proceedings to somehow to the
11 settlement negotiations, if that is that kind of proposal.

12 We support actually many of the comments that
13 Chairman made this morning in his initial comments about
14 various things in their intention to -- Board's intention
15 to adopt a new order within the time limits. We think
16 that is a good idea.

17 Let me just make a quick comment about the conflict
18 of interest allegations. We think the Board needs to use
19 the best staff that it can. And it is not unusual that
20 there are staff that -- the ones that have the best
21 expertise are often involved in these issues in other
22 forms or in other ways. So we think it is really up to
23 the Board and ultimately the Board's decision and not the
24 staff decision. When we think about a conflict of
25 interest charge and allegations are ones that we don't

1 think have a whole bunch of weight.

2 Any further delay in these proceedings really would
3 not be in the best interest of Yuba River fishery. We
4 spent a decade trying to get to D-1644. The fish need
5 basically more water. The SWRCB -- we really support
6 going ahead with the order to make sure that there is a
7 continuum. If we go to the 1965 agreement, there is
8 really not enough water there. And past delays to promote
9 settlement have not really gone anywhere, not really
10 support that settlement.

11 We think there are ways actually that State Board
12 could encourage and promote that settlement. Instead of
13 stepping back in those proceedings, we think you can take
14 an active role to support and promote putting -- perhaps
15 putting a little pressure on all of us to get there.
16 There are ways to do that. One is set a deadline for
17 negotiations as part of your new order. Encourage
18 participation by all parties that may have an interest.
19 That may include Department of Water Resources. We will
20 see where they go. Encouraging or requiring regular
21 progress reports.

22 And finally on interim standards, one way to think
23 about this, we are not saying this is the only way, but
24 one way to think about this is reimpose interim standards,
25 but have the long-term standards as perhaps a way to say

1 if the negotiations fail, we come back to you and say
2 negotiations are going nowhere, we've walked away. Then
3 at that point look at imposing the long-term standards.
4 That may be one way. It would not be inconsistent for us
5 to say let's impose long-term standards now. But that
6 might be one way you might want to consider to encourage
7 us to all work together.

8 And in your augmentation or reconsideration
9 administrative record as required by the State Court,
10 Interior supports the introduction of all proposed
11 exhibits today. We think these exhibits, however, should
12 be considered in light of the entire record, which is
13 quite substantial. We don't think they add much. We may
14 ask a few questions in cross-examination to clarify a few
15 things. Depending on what happens in oral testimony
16 today, we may also want to put on rebuttal testimony,
17 depending on what happens. At this point based on what
18 has been submitted, we don't see that that is a
19 likelihood, but we will see what comes out in oral
20 testimony today, if there is anything.

21 But in any case, let's get moving. Let's proceed.
22 Let's meet this deadline.

23 CHAIRMAN BAGGETT: Thank you.

24 Western Water.

25 MR. GEORGE: Good morning. I am Michael

1 George. I am president of Western Water Company, 102
2 Washington Avenue, Point Richmond, California.

3 I appear today not only on a basis of the water
4 rights that our company owns in the Goldfields on the
5 banks of the Yuba River, but also because we are a
6 significant landowner and farmer in the Wheatland Water
7 District. We farm about 1,200 acres in the Wheatland
8 Water District. And the Wheatland Water District of which
9 we are now a member contributed its water rights to the
10 Yuba County Water Agency almost 50 years ago. In fact, I
11 think a little over 50 years ago and the demands for water
12 in that part of the county are, in fact, in part to
13 provide surface water delivery to our farms which have
14 been promised, as I say, for over half a century. So I
15 make three points as opening comments.

16 First of all, we concur that there is a great value
17 to resolution of these issues. They have been hanging
18 over the heads of all the landowners and all the water
19 users in Yuba County in to some extent in the Sacramento
20 Valley for way too long. In fact, as result of the
21 pendency and the uncertainty associated with the long
22 process that we have all been involved in, the progress
23 toward making the water deliveries, making good on the
24 promises that have been made to the south part of the
25 county about getting surface water and alleviating

1 groundwater overdraft have been deferred and delayed, and
2 that has real economic consequences, and I think those
3 consequences are pretty clearly indicated in the kind of
4 economic differences between the areas of Yuba County that
5 have gotten surface water deliveries and those areas like
6 the Wheatland Water District that have been denied in some
7 large part because of the long pendency of these
8 proceedings.

9 Second, with respect to the issues for resolution.
10 We speak primarily to Issues 2 and 3. That is Decision
11 1644 needs to be revised, rescinded, replaced, updated,
12 changed. Number one, because the -- of the issue with
13 respect to the fisheries and, number two, with respect to
14 the issue of demand.

15 There is a value to certainty of outcome and of
16 water rights and that is a value that is protected, if at
17 all, by this Board. By the same token, uncertainty before
18 this Board creates uncertainty with respect to all of
19 these water rights. We certainly recognize that the
20 previously granted water rights are subject to continuing
21 jurisdiction of this Board and to the continuing demand
22 for environmental stewardship and certainly enhancement
23 and protection of fisheries is an important part of that.
24 We don't disagree with that.

25 However, we believe that the information that has

1 been directed to this Board's attention by the Court
2 seriously contradicts specific statements on which this
3 Board based its Decision 1644. We think that needs to be
4 reevaluated and reconsidered, and we look to the Board to
5 do that.

6 Clearly, when you look at this long record and a lot
7 of complication and a lot of differences of opinion and a
8 lot of argument over expert testimony and so forth, the
9 real practical, real world differences appear to come down
10 to those spring-run minimum flows. And the difference,
11 frankly, between what is in D-1644 and what has been
12 proposed by the agency is the significant difference that
13 has divided the parties for so long.

14 We believe that the evidence that has been submitted
15 and fairly evaluated by an impartial arbiter of water
16 rights with public trust and environmental responsibility
17 will conclude that the fishery is in increasingly better
18 shape, that the agency and water users in Yuba County have
19 been responsible stewards and have continued to manage
20 these water resources to meet the twin goals that were
21 stated earlier; that is to provide beneficial use to the
22 people who have made financial sacrifices, made
23 investment, developed business, economic and family
24 interest in that area while at the same time protecting
25 the environment.

1 Therefore, our participation in this rehearing will
2 be aimed primarily at support of the Yuba County Water
3 Agency and its request for reevaluation in light of the
4 new evidence of principally the spring flows in Decision
5 1644.

6 Thank you very much.

7 CHAIRMAN BAGGETT: Thank you.

8 Western Aggregates. Anybody?

9 With that, let's take ten minutes. At 10:30 we will
10 come back and begin the first witness from SYRCL.

11 Esther, we can go off the record.

12 (Discussion held off the record.)

13 (Break taken.)

14 CHAIRMAN BAGGETT: Any witness who is going to
15 testify in this proceeding, please stand and repeat the
16 oath.

17 (Oath administered by Chairman Baggett)

18 CHAIRMAN BAGGETT: With that, let's proceed.

19 ----oOo----

20 DIRECT EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

21 BY MR. BONHAM

22 MR. BONHAM: Good morning. Please state your
23 name and occupation for the record.

24 MR. ASHUCKIAN: Good morning. I am David
25 Ashuckian with the California Energy Commission, manager

1 of the Electricity Analysis Office, 1816 Ninth Street.

2 MR. BONHAM: Mr. Ashuckian, my name is Chuck
3 Bonham. I represent a collection of conservation groups
4 in this supplement hearing. We are going to discuss a
5 California Energy Commission report and accompanying press
6 release to the California Senate Energy Committee on
7 January 28.

8 Do you have a copy of that report before you?

9 MR. ASHUCKIAN: No, I don't.

10 MR. BONHAM: May I approach?

11 MR. FRINK: I believe everybody was sent a
12 copy of the report along with the hearing notice.

13 MR. BONHAM: Mr. Ashuckian, thank you for
14 attending today. I know you have modified vacation plans.
15 Thank you to the Board and opposing counsel for the
16 convenience of going first.

17 For convenience I will refer to that report as the
18 January 2003 report.

19 Okay?

20 MR. ASHUCKIAN: Okay.

21 MR. BONHAM: Could you again state your title
22 at the California Energy Commission.

23 MR. ASHUCKIAN: Manager of the Electricity
24 Analysis Office, assistant assessment and facilities
25 siting division.

1 MR. BONHAM: Could you please describe your
2 specific responsibilities in that capacity?

3 MR. ASHUCKIAN: The office -- it is my
4 responsibility to include analyzing the state's
5 electricity system, monitoring supply and demand,
6 determining system capacity and flows and reporting to the
7 Governor, Legislature and other agencies on critical
8 issues, regulatory situations, et cetera.

9 MR. BONHAM: In brief what are the
10 responsibilities generally of the California Energy
11 Commission in the context of energy planning and
12 forecasting?

13 MR. ASHUCKIAN: We are responsible for -- the
14 Energy Commission is primarily responsible for ensuring a
15 safe and reliable energy system. We also are responsible
16 for permitting energy facilities. And in that vein we
17 monitor what the addition of existing or new powerplants
18 and capacity will be on the system.

19 So the planning activity is to monitor and analyze
20 additions and subtractions to the system.

21 MR. BONHAM: Mr. Ashuckian, thank you.

22 Were you subpoenaed to appear today?

23 MR. ASHUCKIAN: Yes.

24 MR. BONHAM: As you understand it, what is the
25 purpose of your testimony today?

1 MR. ASHUCKIAN: My understanding is that my
2 purpose is to authenticate the supply and demand balance
3 that we have publicly published and answer any questions
4 regarding specifics to this analysis.

5 MR. BONHAM: Do you have a copy of the January
6 2003 report handy?

7 MR. ASHUCKIAN: Yes.

8 MR. BONHAM: Did the department you manage
9 prepare this January 2003 report?

10 MR. ASHUCKIAN: Yes.

11 MR. BONHAM: Were you personally involved in
12 the preparation?

13 MR. ASHUCKIAN: Yes.

14 MR. BONHAM: Could you describe how?

15 MR. ASHUCKIAN: Well, I basically ensured that
16 the various numbers are copacetic with other information
17 through the Commission.

18 MR. BONHAM: Thank you.

19 Did your department prepare this January 2003 report
20 pursuant to the Energy Commission's responsibilities as
21 this state's energy planning and forecasting entity?

22 MR. ASHUCKIAN: Yes.

23 MR. BONHAM: Are you familiar with the
24 substance of this January 2003 report?

25 MR. ASHUCKIAN: Yes.

1 MR. BONHAM: What is your knowledge of the
2 preparation of this report?

3 MR. ASHUCKIAN: Well, we collect data and
4 information from various sources, including our own demand
5 office. We also collect information from our siting
6 office, other agencies, the CPA, the utilities that
7 provide us information about the various resources
8 available to the state and various programs that have
9 input to what our supply and demand needs are.

10 MR. BONHAM: Is preparation of such a report
11 typical official duty at the Energy Commission?

12 MR. ASHUCKIAN: Yes.

13 MR. BONHAM: Was the January 2003 report
14 produced in the ordinary course of the Energy Commission's
15 business?

16 MR. ASHUCKIAN: Yes.

17 MR. BONHAM: Was the January 2003 report
18 presented to the State Senate Energy Committee in the
19 ordinary course of the Energy's Commission business?

20 MR. ASHUCKIAN: Yes.

21 MR. BONHAM: Was the January 2003 report
22 published on the Energy Commission's website in the order
23 course of the Commission's business?

24 MR. ASHUCKIAN: Yes.

25 MR. BONHAM: I would like to turn briefly to

1 the substance and conclusions of the report. By way of
2 summarizing the contents of the report I would like to ask
3 you a few questions.

4 MR. ASHUCKIAN: Yes.

5 MR. BONHAM: In your expert opinion what is
6 the purpose of the January 2003 report?

7 MR. ASHUCKIAN: The purpose is to provide an
8 outlook on what the supply and demand is from electricity
9 to what we would call determined an early warning
10 indicator of any significant issues that may arise in the
11 near term and/or long term.

12 MR. BONHAM: In your expert opinion what
13 overall conclusions does the energy -- January 2003 Energy
14 Commission report reach?

15 MR. ASHUCKIAN: The conclusions are that we
16 have sufficient supply in the near term, that our reserve
17 margins are adequate for the next few years. However,
18 they continue to decline as time goes on, as the years
19 progress. Basically because of uncertainty in the number
20 of new plants that will be constructed in future years.

21 MR. BONHAM: Thank you.

22 Could you please turn to Page 2, Paragraph 3 of the
23 report? And the sentence beginning "Because this table,"
24 and could you read that first sentence of Paragraph 3.

25 MR. ASHUCKIAN: Because this table

1 looks further into the future, there is
2 more uncertainty built into the estimated
3 values. The 2004 through -8 table also
4 employs a reserve margin known as a
5 planning reserve margin (Reading)

6 MR. BONHAM: Thank you, Mr. Ashuckian.
7 Just the first sentence.

8 Please describe whether that first sentence is
9 inconsistent with the report's conclusion that supplies
10 should continue to remain positive through the year 2005?

11 MR. ASHUCKIAN: Repeat the question.

12 MR. BONHAM: I read that first sentence to
13 suggest, as the agency is planning forward. There is some
14 uncertainty in forecasting?

15 MR. ASHUCKIAN: That's true.

16 MR. BONHAM: My question is: Does that
17 uncertainty undercut the overall conclusion of the report
18 that you provided, based on your expert opinion?

19 MR. ASHUCKIAN: No.

20 MR. BONHAM: Thank you.

21 Please turn to Page 7 of the report, which there are
22 -- actually you have to count the pages; they are lacking
23 in page numbers.

24 Are you there?

25 MR. ASHUCKIAN: I get to the second page of

1 the --

2 MR. BONHAM: The press release. Actually the
3 first page of -- what is this page?

4 MR. ASHUCKIAN: This is a press release that
5 our media and public communications office publishes.
6 That is an attempt to summarize the conclusion of our
7 work.

8 MR. BONHAM: Could you please read the title
9 of this page?

10 MR. ASHUCKIAN: The title is Energy Commission
11 predicts promising energy supply and demand for the next
12 five years.

13 MR. BONHAM: Today, in your opinion, is that
14 still an accurate statement?

15 MR. ASHUCKIAN: I would say that I would
16 shorten the outlook to a little less than five years.
17 Based on some new information, I would say that we predict
18 promising energy supply and demand for the next three to
19 four years.

20 MR. BONHAM: Thank you.

21 Mr. Ashuckian, what has the weather been like this
22 week in Sacramento?

23 MR. ASHUCKIAN: This week has been -- I'd say
24 it started off hot and then kind of cooled off to
25 normal.

1 MR. BONHAM: When the weather was hot, how, if
2 at all, did that weather affect the accuracy of this
3 California Energy Commission January 2003 report's
4 findings?

5 MR. ASHUCKIAN: It doesn't affect it at all.
6 Actually, we do forecast both normal and what we call hot
7 or one-in-ten weather. One-in-ten being an event that
8 would happen once in ten years. So we incorporate that
9 type of event in our normal forecast.

10 MR. BONHAM: Is it possible to describe any
11 energy consequences of this week's earlier hot weather?

12 MR. ASHUCKIAN: Well, hot weather produces
13 more demand.

14 MR. BONHAM: How would, if at all, that
15 consequence of more demand change the accuracy of the 2000
16 California Energy Commission report's findings?

17 MR. ASHUCKIAN: Well, if the weather was
18 consistently higher than one-in-ten, our forecast would be
19 rather low.

20 MR. BONHAM: Thank you.

21 Could you turn to Page 5, please, of the 2003
22 report, which by my count is a 2004-2008 statewide
23 supply/demand balance spreadsheet?

24 MR. ASHUCKIAN: Yes.

25 MR. BONHAM: What does a 9.3 planning --

1 percent planning reserve in a one-in-ten hot summer for
2 August of 2004 mean?

3 MR. ASHUCKIAN: For August of 2004?

4 MR. BONHAM: 2004.

5 MR. ASHUCKIAN: That means that our reserve is
6 expected to be 9 percent above demand, that we're going to
7 have 9 percent more energy -- 9 percent more energy
8 available than demand will require, given a hot event, a
9 hot summer day. These are August.

10 MR. BONHAM: Mr. Ashuckian, if you read across
11 on the planning reserve margin one-in-ten, can you tell me
12 the planning reserve percentages for August 2005.

13 MR. ASHUCKIAN: I read August 2005 is 9
14 percent.

15 MR. BONHAM: August 2006?

16 MR. ASHUCKIAN: 6.9 percent.

17 MR. BONHAM: Which is in a one-in-ten hot
18 summer scenario?

19 MR. ASHUCKIAN: Correct.

20 MR. BONHAM: Thank you.

21 What happens in a normal summer, a one-in-two summer
22 to these planning reserves?

23 MR. ASHUCKIAN: Basically the reserves
24 increase, as you can see on this table, by about 4 to 5
25 percent on average. Normal planning reserves are actually

1 not done for what we consider hot weather. It is normally
2 used as normal weather.

3 MR. BONHAM: Can you tell me, based on the
4 balance spreadsheet, the planning reserve for August 2004
5 in a one-in-two or normal summer?

6 MR. ASHUCKIAN: A normal summer one-in-two
7 planning reserve is 15 percent for August 2004.

8 MR. BONHAM: For August 2005?

9 MR. ASHUCKIAN: 14.8 percent.

10 MR. BONHAM: For August of 2006?

11 MR. ASHUCKIAN: 12.7 percent.

12 MR. BONHAM: Are you familiar with the fact
13 that the interim instream flows expire in April of 2006?

14 MR. ASHUCKIAN: Yes.

15 MR. BONHAM: Are you aware of any subsequently
16 published California Energy Commission reports that
17 contradict this report's findings?

18 MR. ASHUCKIAN: We have updated this report.
19 I would not say that it contradicts it, although it does
20 have new numbers on it that aren't exactly the same
21 numbers.

22 MR. BONHAM: So your department has updated
23 this January 28, 2003 report?

24 MR. ASHUCKIAN: Correct.

25 MR. BONHAM: Chairman and Board Members, I'd

1 move to admit that update and I would refer parties to the
2 hearing notice on Page 8 which states in the first
3 paragraph on that page that the Hearing Officer will
4 decide whether to accept based upon motion.

5 CHAIRMAN BAGGETT: Mr. Lilly.

6 MR. LILLY: Mr. Baggett, I don't know what
7 document he is talking about. I don't think it is
8 appropriate to admit a document that we don't even have it
9 and can see it. We have staff Exhibit 7. We do not have
10 any other papers. I don't know what other update he's
11 talking about and, therefore, I object to the offer to
12 admit something that we don't know what it is.

13 CHAIRMAN BAGGETT: Do you have --

14 MR. BONHAM: I do have a reply. If we can
15 turn to January 2003 report, Page 2, last full sentence,
16 which reads:

17 The Energy Commission staff will continue
18 to reassess our supply and demand outlook
19 so that we will have a better assessment
20 of California's electricity system.

21 (Reading)

22 Mr. Ashuckian, is this reassessment the update you
23 are referring to?

24 MR. ASHUCKIAN: Yes.

25 MR. BONHAM: I have made copies of that

1 update. It was published and posted on the Energy
2 Commission's website on May 12th -- May 20th by my
3 understanding.

4 MR. LILLY: That does not in any way address
5 my objection. The Board -- this Board, even though it
6 doesn't follow all the formal rules of evidence, it
7 requires parties to submit copies of documents that they
8 want to offer into evidence. We have not seen the
9 document Mr. Bonham is referring to.

10 CHAIRMAN BAGGETT: Has a copy been served on
11 any parties. We are trying to do this hearing in an
12 expeditious manner.

13 MR. FRINK: If I could make a suggestion.
14 Staff Exhibit 7 recognized that there would be some
15 updates in the information in that document, and you could
16 ask the witness to describe those updates. But this
17 report hasn't been previously submitted. It is not really
18 offered in rebuttal to Staff Exhibit 7. You could
19 certainly ask the witness to describe the updated
20 information.

21 MR. BONHAM: Thank you.

22 Mr. Ashuckian, I believe I asked whether this update
23 contradicts the January 28, 2003 report.

24 MR. ASHUCKIAN: The answer to that is no.

25 MR. BONHAM: I have no further questions.

1 CHAIRMAN BAGGETT: Thank you.

2 So it will not come in as evidence.

3 No further questions. Cross-examination. I think
4 it would probably be best if you want to sit and we will
5 let the cross-examiner sit opposite.

6 Mr. Lilly.

7 ---oOo---

8 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

9 BY YUBA COUNTY WATER AGENCY

10 BY MR. LILLY

11 MR. LILLY: Good morning, Mr. Ashuckian. I
12 will try to look both at you and the Court Reporter. So
13 if I am looking away from you, I am not trying to be rude.
14 My name is Alan Lilly. I represent the Yuba County Water
15 Agency, and I have some questions this morning.

16 First of all, Mr. Ashuckian, when did you first
17 begin working in the Energy Commission's Electricity
18 Analysis Office?

19 MR. ASHUCKIAN: Actually I started in November
20 of 2002.

21 MR. LILLY: Less than a year ago?

22 MR. ASHUCKIAN: Correct.

23 MR. LILLY: Did any of your previous jobs
24 involve making analyses of California's electricity supply
25 and demand situations?

1 MR. ASHUCKIAN: No.

2 MR. LILLY: Could you please -- do you still
3 have Staff Exhibit 7 in front of you?

4 MR. ASHUCKIAN: Yes.

5 MR. LILLY: Could you please go to the press
6 release which is the last two pages of that?

7 And on the first page of the press release, the
8 fourth paragraph down, do you see where it says:

9 Analysis by the Energy Commission staff
10 finds that California power situation has
11 improved since the electricity crisis of
12 2000. (Reading)

13

14 MR. ASHUCKIAN: Correct.

15 MR. LILLY: Please describe what is meant here
16 by "the electricity crisis of 2000."

17 MR. ASHUCKIAN: Well, in 2000 we had Stage One
18 and Stage Two and Three alerts. Basically, our reserve
19 margin dropped below minimums. The state requires --
20 actually the federal requires 7 percent of a reserve
21 margin on a daily basis. And when that reserve margin
22 drops below that, it becomes what we call an alert.
23 Basically, if there is not enough supply to meet demand,
24 the grid has a potential problem of going down, what we
25 call blackouts.

1 MR. LILLY: Did, in fact, rolling blackouts
2 occur during the electricity crisis of 2000?

3 MR. ASHUCKIAN: Yes.

4 MR. LILLY: About how many days were there
5 such blackouts?

6 MR. ASHUCKIAN: I don't know off the top of my
7 head how many actual days there were.

8 MR. LILLY: Before the electricity crisis of
9 2000 occurred, did any California Energy Commission report
10 predict the crisis?

11 MR. ASHUCKIAN: No, I don't believe so.

12 MR. LILLY: Now going back to the tables in
13 this staff Exhibit 7, there is a table on the third page
14 and a table on the fourth page. The one on the third page
15 begins 2003 California electricity and the one on the
16 fourth page begins 2003 California ISO control area.

17 Do you have those two tables handy?

18 MR. ASHUCKIAN: Yes.

19 MR. LILLY: What is the difference between
20 those two tables?

21 MR. ASHUCKIAN: The first page, the 2003
22 California electricity, covers the supply and demand
23 throughout the state, essentially the borders of
24 California. The second page is California Independent
25 System Operator control area; that is primarily industrial

1 owned utilities.

2 MR. LILLY: Mr. Baggett, I have a few exhibits
3 that I want to ask this witness to look at. One thing the
4 hearing notice has not clarified is how we should number
5 those. So I would just like some direction on how we
6 should number exhibits for this hearing.

7 MR. FRINK: The staff exhibits ended at 7.
8 These would be the exhibits of Yuba County Water Agency,
9 so for now you can just introduce them in order beginning
10 with 1. I think eventually during the administrative
11 record we will include a preface there so that it
12 distinguishes these exhibits from earlier exhibits
13 introduced in the prior hearings.

14 MR. LILLY: We will just call these -- I only
15 have about five or six of them. I will start with YCWA-1
16 and I do have copies for the Board and for the parties.

17 MR. BONHAM: Are these new exhibits or exhibits
18 existing in the administrative record?

19 MR. LILLY: Mr. Baggett, I don't want to be
20 rude to Mr. Bonham, but Hearing Officers in the past have
21 told me I should only answer questions from you. So I
22 don't want to be rude, but --

23 CHAIRMAN BAGGETT: You have a response.

24 MR. LILLY: Okay. The answer is these are new
25 exhibits. They are not in the administrative record. I

1 am using them for cross-examination purposes.

2 MR. BONHAM: Thank you.

3 CHAIRMAN BAGGETT: Entitled.

4 MR. LILLY: Mr. Ashuckian, does this map show,
5 in fact, the area of California that is subject to the
6 Independent System Operator control?

7 MR. ASHUCKIAN: Yes.

8 MR. LILLY: Now referring to the table on the
9 fourth page of Staff Exhibit 7, please explain what the
10 terms -- what the term "estimated operating reserve
11 margin" means?

12 MR. ASHUCKIAN: Estimated operating reserve
13 margin is the excess capacity that we estimate the state
14 will have given a one-in-two or normal weather situation.

15 MR. LILLY: The next line, what does "high
16 temperature reserve margin" mean?

17 MR. ASHUCKIAN: High temperature reserve
18 margin is essentially the same, what a demand that is at
19 the level expected in a hot day of one-in-ten event.

20 MR. LILLY: What does "high temperature
21 reserve margin with spot market imports" mean?

22 MR. ASHUCKIAN: The one-in-ten -- the hot
23 market reserve margin is that same reserve with the
24 addition of expected import available outside of
25 California. Now the first two that I mentioned are not

1 including the market imports.

2 MR. LILLY: In the second page of this
3 exhibit, if you can turn back to where the text is, the
4 last paragraph starts out, says:

5 California appears to be in good shape in
6 the near term. (Reading)

7 Do you see that?

8 MR. ASHUCKIAN: What page?

9 MR. LILLY: The second page of the exhibit
10 where the text is. The very last paragraph, first
11 sentence:

12 California appears to be in good shape in
13 the near term.

14 See that?

15 MR. ASHUCKIAN: Yes.

16 MR. LILLY: Is that statement, in fact, based
17 on the fact that these -- all of these reserve margins
18 exceed the 7 percent that you referred to for Stage One?

19 MR. ASHUCKIAN: Correct.

20 MR. LILLY: How reliable are these reserve
21 margin estimates?

22 MR. ASHUCKIAN: Well, the reserve margins are,
23 we believe, very accurate based on what the capacity is of
24 California. One of the items on this chart is an
25 estimated force and schedule outage. One of the reasons

1 we believe that crisis occurred in 2000 was because of the
2 lack of control we have on individual powerplants, and
3 thus we have the capacity to supply energy. Doesn't mean
4 that that capacity has to be available. This is, we
5 believe, accurate to what is available to California.

6 MR. LILLY: Now for May of 2003, if we go back
7 to the fourth page of that exhibit where we have the 2003
8 California ISO control area and we have the reserve
9 margins. The reserve margins for May are 22 percent, 17
10 percent and 29 percent; is that correct?

11 MR. ASHUCKIAN: Correct.

12 MR. LILLY: Those are all significantly above
13 on the 7 percent margin that would trigger a Stage One?

14 MR. ASHUCKIAN: Correct.

15 MR. LILLY: Just so we are clear, I think you
16 said a Stage One electrical emergency is declared when the
17 reserve margins drop below 7 percent; is that correct?

18 MR. ASHUCKIAN: Correct.

19 MR. LILLY: And based on these reserve margins
20 estimates that range from 17 to 29 percent, did the
21 California Energy Commission predict that there would be
22 any Stage One electrical emergencies during May of 2003?

23 MR. ASHUCKIAN: No.

24 MR. LILLY: Did California, in fact, have any
25 Stage One electrical emergencies during May of 2003?

1 MR. ASHUCKIAN: Yes.

2 MR. LILLY: When did that occur? When did
3 they occur?

4 MR. ASHUCKIAN: It happened once. I don't
5 remember the exact date. It was last week and a half ago
6 or so.

7 MR. LILLY: I will hand you what we will mark
8 as YCWA Exhibit 2. If you can just briefly review this
9 and tell me when you are done.

10 MR. ASHUCKIAN: Sure.

11 Okay.

12 MR. LILLY: Does this press release from the
13 California ISO accurately describe the Stage One
14 electrical emergency that occurred on May 28th, 2003?

15 MR. ASHUCKIAN: I believe so.

16 MR. LILLY: Now, the second -- let me see
17 here. In the first paragraph of this Exhibit 2, the
18 second to last sentence says:

19 Temperatures in California are estimated
20 five to seven degrees above forecast,
21 causing consumer demand on the ISO power
22 grid to run 4,000 megawatts over the
23 projected peak demand of 38,633 megawatts.

24 (Reading)

25 Do you see that?

1 MR. ASHUCKIAN: Yes, I do.

2 MR. LILLY: Could you just explain -- I
3 couldn't figure it out because the Energy Commission's
4 table for May of 2003, which was Page 4 of Staff Exhibit
5 7, it looks like the corresponding number is where it says
6 California ISO control area demand plus operating reserves
7 which is 38,097. I just wonder if you could explain how
8 to reconcile these two numbers?

9 MR. ASHUCKIAN: Yes. The 38,097 was our
10 projected operating demand plus operating reserve for the
11 one-in-ten event. There is a difference there of about
12 600, which is one-half of 1 percent. This particular day
13 had a one-in-40 weather event, where we were predicting a
14 one-in-ten would require 38,067.

15 MR. LILLY: Basically, the ISO's projection
16 was 600 megawatts higher than the Energy Commission's?

17 MR. ASHUCKIAN: Correct.

18 MR. LILLY: And the actual demand was another
19 4,000 megawatts on top of that?

20 MR. ASHUCKIAN: That's right. And actually if
21 you look at our expected capacity, we had the capacity to
22 handle the full 4,000 extra load. It happened to be not
23 available based on what we call planned outages. They
24 didn't predict that there would be such a demand, and so
25 essentially the powerplants were off.

1 MR. LILLY: There was basically less supply
2 than Energy Commission had predicted?

3 MR. ASHUCKIAN: Less supply on line. The
4 capacity was available. They didn't make it available
5 because they didn't expect it to be needed.

6 MR. LILLY: Now did the ISO declare any Stage
7 One electrical emergencies during 2002?

8 MR. ASHUCKIAN: Yes, I believe so.

9 MR. LILLY: How many?

10 MR. ASHUCKIAN: Again, I don't know off the
11 top of my head.

12 MR. LILLY: I will ask you to exam the next
13 exhibit which we will mark as YCWA-3.

14 Have you had a chance to look at Exhibit YCWA-3?

15 MR. ASHUCKIAN: Uh-huh.

16 MR. LILLY: Is that yes?

17 MR. ASHUCKIAN: Yes.

18 MR. LILLY: The Court Reporter can't take --
19 you have to say yes or no or the Court Reporter can't
20 follow you.

21 Based on this, how many Stage One electrical
22 emergencies did the ISO declare in 2002?

23 MR. ASHUCKIAN: Two, as I see.

24 MR. LILLY: And what is the Stage Two
25 electrical emergency?

1 MR. ASHUCKIAN: A Stage Two is where the
2 operating reserves drop below 5 percent.

3 MR. LILLY: Did the ISO declare any Stage Two
4 electrical emergencies during 2002?

5 MR. ASHUCKIAN: Yes, one.

6 MR. LILLY: That was on, looks like, July
7 10th, 2002?

8 MR. ASHUCKIAN: Yes.

9 MR. LILLY: Are you familiar with the ISO term
10 declared restricted maintenance operations?

11 MR. ASHUCKIAN: Yes, somewhat.

12 MR. LILLY: Please tell us your understanding
13 of that term.

14 MR. ASHUCKIAN: Basically, when there is a --
15 there was concern about an imminent emergency. They put
16 out notice such that no voluntary powerplant shut down
17 could occur. Essentially to make sure that everything
18 that can be available is available because we are running
19 on low reserves.

20 MR. LILLY: Were those normally called no
21 touch days?

22 MR. ASHUCKIAN: I don't know.

23 MR. LILLY: I will ask you to examine Exhibit
24 YCWA-4.

25 Does Exhibit YCWA-4, in fact, contain an accurate

1 list of the 18 days for which the ISO had declared
2 restricted maintenance operations during 2002?

3 MR. ASHUCKIAN: It appears, yes.

4 MR. LILLY: What are the entries in the
5 subsequent columns where it says alert, warning and power
6 watch?

7 MR. ASHUCKIAN: I really don't know. I am not
8 familiar with these terms that the ISO uses.

9 MR. LILLY: I am going to hand you a similar
10 table for 2003 and ask you to look at that.

11 MR. ASHUCKIAN: Thank you.

12 MR. LILLY: Does YCWA-5 contain a list of the
13 ten declared restricted maintenance operation days that
14 have already occurred during 2003?

15 MR. ASHUCKIAN: Yes.

16 MR. LILLY: Moving forward to the -- going back
17 to Staff Exhibit 7, which is the Energy Commission's
18 January 2003 report, if you can go forward to the table
19 that is on the fifth page of that exhibit, the one headed
20 at the top 2004 to 2008 Statewide Supply.

21 MR. ASHUCKIAN: Uh-huh.

22 MR. LILLY: This exhibit has some entries for
23 planning reserve margin one and two and planning reserve
24 margin one and ten. Please tell us what the difference is
25 between the reserve margins that are listed on the table

1 on the previous page and these planning reserve margins.

2 MR. ASHUCKIAN: The previous page being the
3 2003 ISO control area table?

4 MR. LILLY: Yes, that is correct. Where they
5 have the estimated operating reserve margin and the high
6 temperature reserve margin.

7 MR. ASHUCKIAN: The table, the 2003 table,
8 provides a monthly breakdown of supply and demand based on
9 the various critical months throughout the year. This
10 next page, the 2004 page, supply and demand balance is
11 what we call more of a planning reserve and it's only for
12 the peak months considered to be August of each subsequent
13 year. The difference being that we have much more
14 accurate information about what is happening this year
15 than we do future years. And, thus, the first table would
16 be considered more of an estimated operating reserve as
17 opposed to the second page which is more of a planning
18 reserve.

19 MR. LILLY: Basically it's less certain
20 because it is farther into the future?

21 MR. ASHUCKIAN: That's correct.

22 MR. LILLY: I notice that for August 2008 the
23 planning reserve margin or one-in-ten is 3 percent; is
24 that correct?

25 MR. ASHUCKIAN: That's correct.

1 MR. LILLY: How accurate of an estimate is
2 this of the actual operating reserves of how low they will
3 actually get during August of 2008?

4 MR. ASHUCKIAN: Repeat the question.

5 MR. LILLY: Basically, how good do you think
6 this prediction is for how the operating reserve margins
7 actually will be in August of 2008?

8 MR. ASHUCKIAN: Historically we have been
9 pretty good in our forecasting. Again, we cannot control
10 for instance what happened last week where there was
11 sufficient capacity but it was turned off. So in effect
12 we can't predict that there is going to be a Stage One or
13 Stage Two or Stage Three because of the actual operating
14 characteristics that may occur at that time.

15 MR. LILLY: Assuming you don't have those
16 operating problems, is the 3 percent an accurate
17 prediction?

18 MR. ASHUCKIAN: Actually based on our more
19 recent data that has improved slightly.

20 MR. LILLY: To what?

21 MR. ASHUCKIAN: I think it's gone from about 2
22 percent to about 5 percent. Secondly, we don't actually
23 use the one-in-ten in our normal planning reserve. We put
24 it here for illustrative purposes, but normally our
25 planning reserve is only along the normal weather one and

1 two.

2 MR. LILLY: But you said -- I think you said
3 actually sometimes the weather gets even hotter than the
4 one-in-ten; is that correct?

5 MR. ASHUCKIAN: That's correct.

6 MR. LILLY: Now I am going to get one more
7 exhibit here. I will mark this YCWA-6, and it is a long
8 report, but it's prepared by the California Energy
9 Commission and you're listed as one of the supervisors at
10 that time. I am not going to ask you to read the whole
11 thing. I am going to ask you to look at it and tell us if
12 you are familiar with it.

13 MR. ASHUCKIAN: Okay.

14 Yes, I am familiar with this.

15 MR. LILLY: What is this document?

16 MR. ASHUCKIAN: This document was a
17 preliminary draft report on the issues that could affect
18 electricity and natural gas infrastructure in the coming
19 years.

20 MR. LILLY: I notice on the third page you are
21 listed as one of the project managers for this; is that
22 correct?

23 MR. ASHUCKIAN: That's correct.

24 MR. LILLY: What was your role in preparation
25 of this report?

1 MR. ASHUCKIAN: Again, my role was on the
2 supply and demand balance, to ensure that the information
3 is accurate, that it is understandable and that it is
4 consistent with other information that we have throughout
5 the agency and other agencies.

6 MR. LILLY: Please turn forward to the page
7 that is marked i, which at the top says Executive Summary.

8 MR. ASHUCKIAN: Uh-huh. I am there.

9 MR. LILLY: In the very last paragraph on this
10 page in the second sentence do you see the statement:

11 Regulatory and economic uncertainties,
12 however, will likely delay the
13 construction some generation capacity
14 previously anticipated in the 2004 to 2006
15 time frame. While the Energy Commission
16 staff believes that there will be a net
17 increase in capacity during this period,
18 the increase may not keep up with the
19 increase in electricity demand causing
20 reserve margins to fall. (Reading)

21 MR. ASHUCKIAN: Yes.

22 MR. LILLY: Just a minute here.

23 First of all, in the second sentence I read it looks
24 like a word is missing. It says:

25 The increase may not be keep up with the

1 increase in electricity. (Reading)

2 Do you know what word is supposed to be there?

3 MR. ASHUCKIAN: Say that again.

4 MR. LILLY: Read the second sentence, the one
5 starts "while the energy staff." Read it out loud.

6 MR. ASHUCKIAN: That is the third sentence?

7 MR. LILLY: Yes.

8 MR. ASHUCKIAN: While the Energy
9 Commission staff believes there will be a
10 net increase in capacity during this
11 period, the increase may not be -- may not
12 be kept up -- may not be kept up -- keep
13 up with the increase in electricity
14 demand. (Reading)

15 MR. LILLY: So we should cross out the "be"?

16 MR. ASHUCKIAN: Yeah. Actually, this is
17 consistent with our table that you've just seen in Exhibit
18 7 which shows the reserve margin decreasing over time.

19 MR. LILLY: So if we cross out the "be,"
20 you agree with the statements in these two sentences?

21 MR. ASHUCKIAN: Yes.

22 MR. LILLY: Moving forward to Page 8 of this
23 report which is Exhibit YCWA-6, under the heading that
24 says "construction, delays, cancellation and debt," the
25 first sentence reads:

1 The past 18 months have seen the delay or
2 cancellation of dozens of proposed
3 powerplants in California and the Western
4 United States. See Table 2-5. (Reading)

5 Do you see that sentence?

6 MR. ASHUCKIAN: Yes.

7 MR. LILLY: Do you agree with that sentence?

8 MR. ASHUCKIAN: Yes.

9 MR. LILLY: Why are these delays and
10 cancellations of dozens of proposed powerplants occurring?

11 MR. ASHUCKIAN: Well, we believe there is a
12 number of reasons. One of which is the financial
13 situation has been unfavorable for capital investment and,
14 two, because of our significant reserve margins in the
15 near term these plants aren't necessary in the near term.

16 MR. LILLY: Could you please just describe the
17 financial uncertainties or the financial problems that
18 cause these delays?

19 MR. BONHAM: Objection. Beyond the scope of
20 the key issue within the supplement hearing.

21 MR. LILLY: I don't think it is at all. The
22 whole question is whether or not there is going to be a
23 long-term electricity problem in California and if there
24 is going to be problems where projected powerplants are
25 not actually going to be built, that is directly bearing

1 on the supply for California in the future.

2 CHAIRMAN BAGGETT: Restate. Overruled.

3 MR. LILLY: Mr. Ashuckian, please just explain
4 -- you mentioned that there were some financial problems
5 regarding construction of new powerplants. Please just
6 explain what those are.

7 MR. ASHUCKIAN: Well, we are actually not -- I
8 wouldn't say we are expert in this area. We understand
9 based on what we have been told by various just powerplant
10 owners that they are having difficult times getting
11 capital investment to produce plants. We will also know
12 that because of the sufficient availability, that there is
13 -- they're having a difficult time securing contracts to
14 secure that power that would be procured from those
15 plants, and thus you can't -- we believe it is difficult
16 to get funding for a plant without guarantee that the
17 energy will be necessary to be used.

18 MR. LILLY: Going on to Page 9 of this same
19 exhibit, where there is the heading projections 2004 to
20 2006.

21 Do you see that heading?

22 MR. ASHUCKIAN: Yes.

23 MR. LILLY: I'm going to read the first two
24 sentences after that:

25 While Energy Commission staff have

1 carefully monitored the progress of
2 development projects in California and
3 remainder of the west, projections of
4 infrastructure development during
5 2004/2006 must acknowledge a great deal of
6 uncertainty. Decisions regarding capacity
7 additions, retirements and transmission
8 upgrades are more often than not being
9 delayed pending developments in both
10 electricity and natural gas markets and
11 various regulatory arenas. (Reading)

12 Do you see those sentences?

13 MR. ASHUCKIAN: Yes.

14 MR. LILLY: Do you agree?

15 MR. ASHUCKIAN: Yes.

16 MR. LILLY: Finally, if you can turn forward to
17 Page 15 of this report. Do you see the heading
18 projections 2007 to 2013?

19 MR. ASHUCKIAN: Yes.

20 MR. LILLY: The first sentence reads:
21 Whatever uncertainty exists surrounding
22 changes in the energy infrastructure
23 during 2004 to 2006 are multiplied tenfold
24 for the years that follow. (Reading)

25 Do you see that sentence?

1 MR. ASHUCKIAN: Yes.

2 MR. LILLY: Do you agree with that sentence?

3 MR. ASHUCKIAN: No.

4 MR. LILLY: You don't? But this is a report
5 that was pre- -- that you were one of the supervisors for?

6 MR. ASHUCKIAN: This is a draft report.
7 Again, this is dated February 11, 2003. And again, we
8 have actually a more updated report that was just
9 published May 27th. And, in fact, I would say I don't
10 agree with the multiplying tenfold, I don't think we have
11 an accurate assessment of how the magnitude of that should
12 be assessed. I would agree in principle that further out
13 our projections go, the more uncertainty there is.

14 MR. LILLY: You agree that for post 2006 the
15 uncertainty is greater than for pre-2006, but may not be
16 a tenfold uncertainty?

17 MR. ASHUCKIAN: That is correct.

18 MR. LILLY: I guess it is kind of hard to
19 quantify an uncertainty, anyways; is that correct?

20 MR. ASHUCKIAN: Yes.

21 MR. LILLY: Are you familiar with the Federal
22 Energy Regulatory Commission?

23 MR. ASHUCKIAN: Yes.

24 MR. BONHAM: Objection. Beyond the scope of
25 supplemental hearing Key Issue No. 4.

1 MR. LILLY: I don't think so. Certainly --
2 what I was going to ask him was how the Federal Energy
3 Regulatory Commission's actions may affect the energy
4 supply and demand situation in California over the next
5 five years. I think that is appropriate.

6 CHAIRMAN BAGGETT: Continue. Overruled.
7 Foundation.

8 MR. LILLY: First of all, what is the Federal
9 Energy Regulatory Commission?

10 MR. ASHUCKIAN: It's the agency that oversees
11 market regulatory activities throughout the country and
12 has overriding jurisdiction over states.

13 MR. LILLY: Are you familiar that Federal
14 Energy Regulatory Commission also regulates hydroelectric
15 power projects?

16 MR. ASHUCKIAN: Yes.

17 MR. LILLY: Would any actions by the Federal
18 Energy Regulatory Commission over the next several years
19 affect electricity supplies in California?

20 MR. BONHAM: Objection. Calls for
21 speculation, any actions over the upcoming years.

22 MR. LILLY: May I respond?

23 CHAIRMAN BAGGETT: Please.

24 MR. LILLY: He is an expert in this field. I
25 think this is certainly within his qualifications.

1 CHAIRMAN BAGGETT: I would agree. Overruled.

2 MR. ASHUCKIAN: Repeat the question.

3 MR. LILLY: Will any actions by the Federal
4 Energy Regulatory Commission over the next several years
5 affect electricity supplies in California?

6 MR. ASHUCKIAN: I don't know. They have the
7 authority to affect California supplies, but I don't know
8 that they will.

9 MR. LILLY: What types of authorities do they
10 have that could affect California's electricity supplies?

11 MR. ASHUCKIAN: They control the relicensing
12 of hydropower plants and the -- a significant portion of
13 energy that comes to California, if they choose to curtail
14 that energy that would have an affect on California's
15 supplies.

16 MR. LILLY: Are you familiar with the Yuba
17 River Development Project?

18 MR. ASHUCKIAN: Somewhat.

19 MR. LILLY: What is the total generation
20 capacity of the Yuba River Project?

21 MR. ASHUCKIAN: I believe it's around 375
22 megawatts.

23 MR. LILLY: Are you familiar with the term
24 "peaking capacity"?

25 MR. ASHUCKIAN: Yes.

1 MR. LILLY: What is peaking capacity?

2 MR. ASHUCKIAN: That is the energy that is
3 available during the peak hours of demand.

4 MR. LILLY: When are the peak hours of demand
5 in California?

6 MR. ASHUCKIAN: In California it is what we
7 display on our table, the expected demand during the hot
8 days of August -- July through August, September.

9 MR. LILLY: What time of day?

10 MR. ASHUCKIAN: Again, we don't predict the
11 weather. In general it happens later in the afternoon.
12 As you can see in the ISO information, it's usually three
13 to 4:00 in the afternoon.

14 MR. LILLY: Is that because the air
15 conditioners are running at the highest during that time?

16 MR. ASHUCKIAN: Probably.

17 MR. LILLY: Why is peaking capacity important
18 for electricity supply in California?

19 MR. ASHUCKIAN: To maintain an adequate
20 reserve margin. We want to make sure that when everybody
21 turns their air conditioners on that there is enough
22 energy to handle that demand.

23 MR. LILLY: What is the peaking capacity of
24 the Yuba River Project?

25 MR. ASHUCKIAN: I don't know that off the top

1 of my head.

2 MR. LILLY: Going back to your report which is
3 Staff Exhibit 7, could you please look at that table on
4 the fourth page that says 2003 California ISO Control
5 Area.

6 MR. ASHUCKIAN: Okay. I am there.

7 MR. LILLY: What peaking capacity is assumed
8 for the Yuba River Project in this table?

9 MR. ASHUCKIAN: Again, this is an aggregate of
10 all capacity available in California. So we don't have
11 breakdowns of every individual project.

12 MR. LILLY: I am just asking which one of
13 these entries would include peaking capacity from the Yuba
14 River Project?

15 MR. ASHUCKIAN: Well, Line 8, ISO control area
16 hydro.

17 MR. LILLY: Some element of those numbers is
18 for the Yuba Project?

19 MR. ASHUCKIAN: That would be included there,
20 yes.

21 MR. LILLY: You don't know what the numbers
22 are?

23 MR. ASHUCKIAN: Yes.

24 CHAIRMAN BAGGETT: Mr. Lilly, you are already
25 over.

1 MR. LILLY: I am down to the last half of my
2 last page. I have less than five minutes left. I am just
3 following up on what his understanding of the Yuba River
4 Project and how it relates to what he's talked about so
5 far.

6 Thank you.

7 CHAIRMAN BAGGETT: Continue.

8 MR. ASHUCKIAN: Yes.

9 MR. LILLY: Mr. Ashuckian, please go forward
10 to the next page of your exhibit which is the table
11 entitled 2004/2008 Statewide Supply Demand Balance.

12 MR. ASHUCKIAN: Okay.

13 MR. LILLY: What peaking capacity is assumed
14 for the Yuba River Project in this table?

15 MR. ASHUCKIAN: Again, it's been wrapped up
16 into the total expected supply.

17 MR. LILLY: You don't know what the number is?

18 MR. ASHUCKIAN: There is no way I can tell.

19 MR. LILLY: What is the concept of load
20 following?

21 MR. ASHUCKIAN: Load following is essentially
22 where you want to make sure that as demand increases
23 supply increases as well.

24 MR. LILLY: Are generation facilities needed
25 for load following during both peak and off-peak demand

1 periods?

2 MR. ASHUCKIAN: I believe so.

3 MR. LILLY: Are you familiar with how the Yuba
4 River Project is used for load following?

5 MR. ASHUCKIAN: No, I am not.

6 MR. LILLY: Are you familiar with the State
7 Water Resources Control Board's Water Right Decision 1644?

8 MS. ASHUCKIAN: Not really. I saw pieces of it
9 for this hearing, but that's it.

10 MR. LILLY: Have you reviewed the estimates
11 that are stated in that Decision regarding the amounts of
12 energy that the Yuba River Project will be able to
13 generate after April of 2006?

14 MR. ASHUCKIAN: No.

15 MR. LILLY: So do you know how Decision 1644
16 would affect the amounts of energy that the Yuba River
17 Project will be able to generate after April 2006?

18 MR. ASHUCKIAN: No.

19 MR. LILLY: Do you know Decision 1644 would
20 affect the Yuba River Project's ability to contribute to
21 peak demands -- to contribute supplies during peak demand
22 periods?

23 MR. ASHUCKIAN: No.

24 MR. LILLY: Do you know how Decision 1644
25 would affect the Yuba River Project's ability to

1 contribute to load following when needed in California?

2 MR. ASHUCKIAN: No.

3 MR. LILLY: Has the Energy Commission
4 considered any of the affects of D-1644 while preparing
5 any of its estimates of future electricity supplies?

6 MR. ASHUCKIAN: No.

7 MR. LILLY: One moment. I am almost done.

8 Thank you, Mr. Ashuckian. I have no further
9 questions.

10 Mr. Baggett, at some point I would like to offer the
11 exhibits, YCWA-1 through 6. I don't know whether it is
12 now or later, but I do want to make sure they are offered
13 into evidence.

14 MR. FRINK: Now would be okay. I consulted
15 with Mr. Mona who played a major roll in preparing the
16 record earlier in the proceedings. What we decided was
17 for purposes of clarification to keep these exhibits
18 separately identified and distinct from earlier exhibits,
19 that all of the exhibits introduced at this hearing have
20 2003 in front of them. So your new exhibits would be 2003
21 followed by YCWA and then the number of the exhibit. And
22 similarly, the staff exhibits for this hearing will have
23 2003 in front of them.

24 MR. LILLY: With that, I will offer Exhibits
25 2003 YCWA-1 through 6.

1 CHAIRMAN BAGGETT: Objections?
2 If not, they are so admitted.
3 Continue on here.
4 Brophy Water District, do you have any cross?
5 MR. BARTON: No.
6 CHAIRMAN BAGGETT: Browns Valley?
7 MR. BEZERRA: No, Mr. Baggett.
8 CHAIRMAN BAGGETT: South Yuba Water District?
9 MR. MINASIAN: On behalf of South Yuba and
10 Cordua, no questions.
11 CHAIRMAN BAGGETT: Department of Fish and
12 Game.
13 MR. CUNNINGHAM: No objections.
14 CHAIRMAN BAGGETT: No questions.
15 Mr. Brandt, Interior?
16 MR. BRANDT: No questions.
17 CHAIRMAN BAGGETT: Western Water?
18 MR. MORRIS: No questions.
19 CHAIRMAN BAGGETT: Any redirect?
20 MR. BONHAM: Five minutes or less, please.
21 CHAIRMAN BAGGETT: Please continue.
22 MR. FRINK: Mr. Baggett, staff may have a few
23 questions.
24 Excuse me, Mr. Bonham. I have a few questions
25 before you do your redirect.

1 CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

2 BY STAFF

3 MR. FRINK: Mr. Ashuckian, you mentioned that
4 peak electricity demand ordinarily occurs around three or
5 four in the afternoon.

6 Do you know about how many hours the Energy
7 Commission considers the peak demand period to last
8 ordinarily?

9 MR. ASHUCKIAN: I don't think we have a
10 specific rule of thumb, but generally it is a couple of
11 hours, usually things are curtailed by about seven, six or
12 7:00 at night.

13 MR. FRINK: Is the Energy Commission involved
14 at all or do you understand if the different
15 hydroelectrical projects in the state coordinate their
16 operations to meet the demand for electrical power that
17 occurs at a particular time on a particular day?

18 MR. ASHUCKIAN: There is a number of owners
19 that control different plants. We don't believe there is
20 coordination although the ISO basically has their -- they
21 monitor what -- they ask for demand. I would say we are
22 not aware of any coordinating activities, although people
23 are -- in general the operators know what the demand
24 curves are and anticipate that.

25 MR. FRINK: I wonder if you know if the

1 release required from Lake Shasta or Lake Oroville are
2 ever affected by the requirements to provide certain flows
3 into the Sacramento-San Joaquin Delta as required by the
4 State Water Resources Control Board. Are you familiar
5 with that situation at all?

6 MR. ASHUCKIAN: No.

7 MR. FRINK: I believe that is all the
8 questions I have.

9 Thank you.

10 CHAIRMAN BAGGETT: Redirect.

11 MR. BONHAM: Thank you.

12 ----oOo----

13 REDIRECT EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

14 BY MR. BONHAM

15 MR. BONHAM: Thank you for your patience, Mr.
16 Ashuckian.

17 You manage the Electricity Analysis Office I
18 believe, correct?

19 MR. ASHUCKIAN: Correct.

20 MR. BONHAM: Does that office provide
21 independent objective analysis of the electricity market?

22 MR. ASHUCKIAN: We believe so.

23 MR. BONHAM: Could you describe what you mean
24 when you say independent and objective?

25 MR. ASHUCKIAN: We are not -- we are not

1 provided direction as to what assumptions, what numbers
2 should be incorporated in our analyses. We determine that
3 on our own.

4 MR. BONHAM: Could you turn to the YCWA new
5 exhibit. I apologize for forgetting the numbers. The
6 largest and I think the last document.

7 MR. ASHUCKIAN: The report from February 11th?

8 MR. BONHAM: Yes.

9 CHAIRMAN BAGGETT: Exhibit 6.

10 MR. BONHAM: Yes. YCWA Exhibit 6.

11 Could you just look at the cover page for me, and on
12 the right-hand margin, what is the title of this?

13 MR. ASHUCKIAN: Staff Draft Report.

14 MR. BONHAM: What does draft mean to you?

15 MR. ASHUCKIAN: Draft means that it is a work
16 in progress, that it is subject to change, that we haven't
17 received input from various parties that may have an
18 interest in what we are saying.

19 MR. BONHAM: Are drafts subject to update?

20 MR. ASHUCKIAN: Yes.

21 MR. BONHAM: Have you referred to today an
22 update by the California Energy Commission?

23 MR. ASHUCKIAN: Yes.

24 MR. BONHAM: Thank you.

25 Mr. Ashuckian, is weather sometimes cooler than a

1 one-in-ten scenario?

2 MR. ASHUCKIAN: Most of the time by
3 definition.

4 MR. BONHAM: Is it sometimes cooler than a
5 one-in-two normal summer?

6 MR. ASHUCKIAN: Yes.

7 MR. BONHAM: Weather is always in flux?

8 MR. ASHUCKIAN: Correct.

9 MR. BONHAM: When you forecast, you attempt to
10 forecast around certain uncertainties, including weather?

11 MR. ASHUCKIAN: Yes.

12 MR. BONHAM: Thank you.

13 Would the possibility of a less than 7 percent
14 reserve Stage One emergency arise in any given year?

15 MR. ASHUCKIAN: Repeat the question.

16 MR. BONHAM: Would the possibility, simply the
17 possibility, of a less than 7 percent reserve, Stage One
18 emergency be a possibility for any given year in the
19 future?

20 MR. ASHUCKIAN: Yes.

21 MR. BONHAM: Including any year past the year
22 2006?

23 MR. ASHUCKIAN: Yes.

24 MR. BONHAM: Do you know whether the Decision
25 1644 interim instream flows continue past April of 2006?

1 MR. ASHUCKIAN: My understanding is that they
2 do not.

3 MR. BONHAM: What is ISO?

4 MR. ASHUCKIAN: The ISO is an independent
5 systems operator that has been created to essentially
6 establish the appropriate supply and demand or supply for
7 the investor owned utility territory.

8 MR. BONHAM: What is the relationship between
9 the ISO and the California Energy Commission?

10 MR. ASHUCKIAN: We coordinate our assumption
11 and numbers and basically communicate, but there is no
12 formal relationship.

13 MR. BONHAM: Is the California Energy
14 Commission this state's expert energy forecasting
15 commission?

16 MR. ASHUCKIAN: Yes.

17 MR. BONHAM: Please correct me if I misheard
18 you.

19 Do you believe that a reason for possibly
20 nonconstruction of new plants is that the market is not
21 interested in funding new plants when the likelihood of
22 sufficient supply is high?

23 MR. ASHUCKIAN: Yes.

24 MR. BONHAM: Thank you.

25 Why were you called to testify today?

1 MR. ASHUCKIAN: To authenticate the
2 projections in our supply and demand balance.

3 MR. BONHAM: Do those projections apply to the
4 entire state?

5 MR. ASHUCKIAN: Yes.

6 MR. BONHAM: They are not project-specific to
7 the Yuba River?

8 MR. ASHUCKIAN: No.

9 MR. BONHAM: And are those conclusions in that
10 report, January 28, 2003, accurate today?

11 MR. ASHUCKIAN: Yes, the trends and its
12 overall conclusions are still accurate.

13 MR. BONHAM: I have no further questions.
14 Thank you.

15 CHAIRMAN BAGGETT: Is there recross by any of
16 the parties? Mr. Lilly?

17 MR. LILLY: One question. I can't say that --
18 two. It is better if I split it into two.

19 ----oOo----

20 RE-CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

21 BY YUBA COUNTY WATER AGENCY

22 BY MR. LILLY

23 MR. LILLY: Mr. Ashuckian, you referred to a
24 recent update by the California Energy Commission to its
25 prior report; is that correct?

1 MR. ASHUCKIAN: Correct.

2 MR. LILLY: Do any of these updates change the
3 overall conclusion of the prior reports that reserve
4 margins will continue to decline over the next several
5 years?

6 MR. ASHUCKIAN: No.

7 MR. LILLY: No further questions.

8 CHAIRMAN BAGGETT: Is there any other recross?
9 If there is not --

10 MR. CUNNINGHAM: Mr. Baggett, if I might,
11 sir.

12 ----oOo----

13 RE-CROSS-EXAMINATION OF SOUTH YUBA RIVER CITIZENS LEAGUE

14 BY DEPARTMENT OF FISH AND GAME

15 BY MR. CUNNINGHAM

16 MR. CUNNINGHAM: Mr. Ashuckian, Bill
17 Cunningham with the Attorney General, representing the
18 Department of Fish and Game.

19 In response to actually the last question asked to
20 you. Question was a prediction of declining reserves.
21 But Mr. Ashuckian, isn't it my understanding that your
22 report is not to predict declining reserve, it predicts an
23 uncertainty in knowing what future reserves will be
24 because you cannot predict whether or not somebody will
25 build in the future, not necessarily that there are plants

1 that are going to go off line or reserves that will be
2 lost, you just cannot predict new reverses at the same
3 time you are predicting new demands; is that correct?

4 MR. LILLY: Mr. Baggett, I am going to
5 object to that question on the basis that it is compound
6 and leading. I think it would be more appropriate if
7 counsel could just ask the witness a straightforward
8 question rather than trying to get him to verify a long
9 statement.

10 CHAIRMAN BAGGETT: I would sustain. Can you
11 break it down?

12 MR. CUNNINGHAM: Thank you, Mr. Baggett.

13 Mr. Ashuckian, my understanding of the questions you
14 were asked dealt with whether or not your reports
15 predicted a long-term decline in capacity or reserve; is
16 that correct?

17 MR. ASHUCKIAN: Yes. Based on the information
18 that we have in front of us on expected powerplant
19 construction, the reserve margin will decline if no new
20 powerplants are built.

21 MR. CUNNINGHAM: But the operative if or but
22 is if no new powerplants are built?

23 MR. ASHUCKIAN: Correct.

24 MR. CUNNINGHAM: So when you state that there
25 is a prediction of decline in reserve, there is no loss of

1 reserve, just a lack of ability to understand new reserve?

2 Is that an accurate statement of what is happening?

3 You are not saying that we are losing reserves; you
4 are saying we cannot predict how much new reserve will be
5 built?

6 MR. ASHUCKIAN: Correct.

7 MR. CUNNINGHAM: At the same time, however,
8 you are saying there will be new demand; is that correct?

9 MR. ASHUCKIAN: Yes.

10 MR. CUNNINGHAM: Are you saying there will be
11 new demand with the same certainty or with any certainty?
12 Again, excuse me, but I was a little confused by this. It
13 is my understanding that what happens here is you are
14 saying you can predict new demand with sufficient
15 certainty that you can project it into the future, but you
16 cannot predict developed new capability to respond to that
17 demand?

18 MR. ASHUCKIAN: Historically California has
19 continued to grow at a pretty constant rate. So we have a
20 higher -- we have a higher level of confidence that the
21 growth in California will continue. We cannot control our
22 plant construction by private entities at this -- right
23 now. The government -- the governor has established a new
24 agency, called the Power Authority, to help finance new
25 powerplants. So there is efforts going on to encourage

1 new powerplant construction, but what our outlooks are
2 attempting to portray is what is today's construction
3 activity based on or compared to today's projected demand.

4 MR. CUNNINGHAM: The possible gap in reserve
5 that will develop in the future is a hypothetical gap
6 because you have a relatively certain population growth
7 and a relatively uncertain growth of capacity to generate
8 electricity?

9 MR. ASHUCKIAN: Absolutely.

10 MR. CUNNINGHAM: Just that?

11 MR. ASHUCKIAN: Absolutely.

12 MR. CUNNINGHAM: Thank you.

13 That is all the questions I have.

14 CHAIRMAN BAGGETT: Any other questions on
15 recross, recross-recross?

16 I will give you an opportunity for rebuttal for one
17 minute.

18 MR. LILLY: I apologize for belaboring this,
19 but I think there was something that was not clear in the
20 last line of questions that we need clarification on.

21 ----oOo----

22 //

23 //

24 //

25 //

1 FURTHER RECROSS-EXAMINATION OF
2 SOUTH YUBA RIVER CITIZENS LEAGUE
3 BY YUBA COUNTY WATER AGENCY
4 BY MR. LILLY

5 MR. LILLY: Please turn to Staff Exhibit 7,
6 the table that is on the fifth page which says 2004/2008
7 Statewide Supply/Demand Balance.

8 Do you have that?

9 MR. ASHUCKIAN: What page?

10 MR. LILLY: The fifth page with the table for
11 the 2004/2008 period.

12 MR. ASHUCKIAN: Okay.

13 MR. LILLY: I think there may have been
14 something that didn't come across quite clearly. But does
15 this table assume that there will be new capacity
16 constructed in California?

17 MR. ASHUCKIAN: Yes.

18 MR. LILLY: Is that, in fact, the line where
19 it says "high probability CA additions"?

20 MR. ASHUCKIAN: That's correct.

21 MR. LILLY: Thank you.

22 CHAIRMAN BAGGETT: If there is no further
23 questions for this witness, the witness is excused.

24 I would propose procedurally we have a little time
25 before lunch that -- are any parties ready to offer

1 rebuttal on just this issue, on the energy issue?

2 It may be nice to get the energy issue done with so
3 tomorrow afternoon we don't end up with rebuttal on this
4 after we talked about fish flows.

5 MR. LILLY: Mr. Baggett, we will be offering
6 rebuttal, but we are not prepared to do that right now.
7 We just got this information now, and it will take us some
8 time. I am sorry, we can't do that. We are ready to put
9 on the fishery witnesses.

10 CHAIRMAN BAGGETT: Just to get a sense, how
11 much rebuttal are we expecting? Yuba is going to have
12 rebuttal on the energy issue.

13 Is anybody else?

14 No other parties have rebuttal witnesses?

15 Thank you.

16 MR. BONHAM: Thank you.

17 CHAIRMAN BAGGETT: Let's at least we might be
18 able to get the case in, your witnesses. Can we do it
19 before lunch, Mr. Lilly?

20 MR. LILLY: We certainly will be glad to try.

21 CHAIRMAN BAGGETT: Let's see how far we can
22 get. Yuba County Water Agency witnesses.

23 MR. LILLY: We will start with Bill Mitchell.

24 CHAIRMAN BAGGETT: Want to put them on in a
25 panel?

1 MR. LILLY: What we propose is we put
2 Mr. Mitchell and Mr. Bratovich on as a panel. They are
3 dealing with the fishery issues. It's up to you, of
4 course, but Mr. Aikens is totally separate. So we can
5 either have all three as one panel or we can do Bratovich
6 and Mitchell as one panel and Aikens as the other.

7 CHAIRMAN BAGGETT: I would just as soon do all
8 three so it will save a lot of time.

9 ---oOo---

10 DIRECT EXAMINATION OF YUBA COUNTY WATER AGENCY

11 BY MR. LILLY

12 MR. LILLY: Mr. Mitchell, state your name and
13 spell your last name for the record.

14 MR. MITCHELL: William Mitchell,
15 M-i-t-c-h-e-l-l.

16 MR. LILLY: Have you taken the oath for
17 today's hearing?

18 MR. MITCHELL: Yes.

19 MR. LILLY: Did you previously testify during
20 the State Board's 1992 and 2000 Lower Yuba River hearings?

21 MR. MITCHELL: Yes.

22 MR. LILLY: I am going to hand you YCWA-8 from
23 the 2000 hearing.

24 Does this exhibit still contain an accurate
25 description of your education and work experience with the

1 obvious understanding that there may be some updates from
2 the last couple of years?

3 MR. MITCHELL: Yes.

4 MR. LILLY: Do you have a copy of State Board
5 Staff Exhibit 4?

6 MR. MITCHELL: Yes.

7 MR. LILLY: Are the statements in this exhibit
8 accurate?

9 MR. MITCHELL: Yes, they are.

10 MR. LILLY: Please very briefly describe the
11 chinook salmon spawning escapement surveys that the
12 California Department of Fish and Game conducted on the
13 Lower Yuba River between 1953 and 1989.

14 MR. MITCHELL: Starting in 1953 the Department
15 of Fish and Game began conducting surveys on the Lower
16 Yuba River to estimate the number of fall-run chinook
17 salmon spawning each year. Those surveys were conducted
18 weekly during the fall-run chinook salmon spawning period
19 and primarily covered the segment of the river where the
20 spawning reach is downstream of Highway 20 to Marysville.

21 The estimate was of total number of fish spawning
22 in the river each year was based on the use of a -- or
23 required the use of a mark/recapture method which involves
24 tagging and counting the number of dead salmon each week
25 of the surveys, and then counting the number of tagged

1 carcasses that are recovered in subsequent weeks.

2 MR. LILLY: Is this a statistical method to
3 estimate the overall spawning, adult spawning population?

4 MR. MITCHELL: Yes, it is a standard
5 statistical method.

6 MR. LILLY: Please just very briefly describe
7 the chinook salmon spawning escapement surveys that Jones
8 & Stokes has conducted on the Lower Yuba River since 1990?

9 MR. MITCHELL: Starting in 1991 Jones & Stokes
10 was hired by Yuba County Water Agency to continue the
11 spawning escapement surveys that DFG had since -- had
12 terminated the previous year. We have done so through the
13 present. Those surveys essentially involved conducting
14 surveys in the same manner that the Department of Fish and
15 Game did. Although starting in 1994, we expanded the
16 survey to include the reach above Highway 20 which we call
17 at Rose Bar Reach. And that extends from the narrows
18 downstream to Highway 20. It basically captures the
19 remainder of the spawning habitat in the river.

20 MR LILLY: That would be the spawning habitat
21 upstream of Highway 20?

22 MR. MITCHELL: Yes.

23 MR. LILLY: Please refer to Exhibit C of Staff
24 Exhibit 4, and I notice that it is up on the overhead
25 projector as well.

1 What is Exhibit C?

2 MR. MITCHELL: Exhibit C is a table with the
3 estimates of total spawning escapement in each year the
4 survey was conducted. This again is the estimate of the
5 fall-run chinook salmon population in each year from 1953
6 through 2002, and it is broken into two periods, the
7 pre-New Bullards Bar Reservoir period and post New
8 Bullards Bar Reservoir period.

9 MR. LILLY: Why does the pre-reservoir period
10 go through 1971?

11 MR. MITCHELL: That represents the years when
12 the Yuba River Development Project did not have an effect
13 or basically was not operating, so, therefore, was not a
14 condition for escapement.

15 MR. LILLY: Why is there a lag -- the project
16 was basically finished in 1969, yet you go to 1971.

17 MR. MITCHELL: Correct.

18 MR. LILLY: Why is that?

19 MR. MITCHELL: Because when the reservoir was
20 completed, the numbers of fish that would not have --
21 basically since -- I believe -- trying to remember when
22 the reservoir was completed or the dam was completed. I
23 believe that was 1969. And, therefore, because it takes
24 three years for salmon to return to the river, you would
25 not expect an affect until three years later.

1 MR. LILLY: Please go forward to Exhibit D to
2 your declaration and tell us what this is.

3 MR. MITCHELL: These are the same numbers
4 shown in Exhibit C, but displayed in a graphical form, in
5 a bar graph form.

6 MR. LILLY: For 1994 and 1996 on to the
7 present there is both outlined bars and shaded bars.
8 Please just tell us what the differences are between those
9 two.

10 MR. MITCHELL: The outlined bars are estimates
11 of total spawning escapement of fall-run if you assume or
12 make the assumption that the numbers of fish above Highway
13 20 were 15 and a half percent of the total run, which the
14 Department of Fish and Game had done previously.

15 The dark bars are the years in which we did actual
16 surveys at Rose Bar Reach. And those dark bars represent
17 estimated total spawning escapement with those actual
18 estimates included.

19 MR. LILLY: Thank you.

20 I have no further questions for you, Mr. Mitchell.
21 I will shift over to Mr. Bratovich.

22 Mr. Bratovich, please make sure your microphone is
23 on.

24 MR. BRATOVICH: I believe it is.

25 MR. LILLY: Please state your name and spell

1 your last name for the record.

2 MR. BRATOVICH: Paul Bratovich,
3 B-r-a-t-o-v-i-c-h.

4 MR. LILLY: Have you taken the oath for
5 today's hearing?

6 MR. BRATOVICH: Yes, I have.

7 MR. LILLY: Did you previously testify during
8 the State Board's 2000 Lower Yuba River hearing?

9 MR. BRATOVICH: Yes.

10 MR. LILLY: I am going to hand you a copy of
11 Exhibit SYCWA-6 and ask you if this is still an accurate
12 description of your education and work experience?

13 MR. BRATOVICH: Yes. It is accurate up until
14 the year 2000.

15 MR. LILLY: What has happened since then, very
16 briefly?

17 MR. BRATOVICH: I have continued similar types
18 of investigations since then.

19 MR. LILLY: Do you have a copy of State Board
20 Staff Exhibit 5, which is your declaration, in front of
21 you?

22 MR. BRATOVICH: Yes.

23 MR. LILLY: Are the statements -- I will wait
24 till you get it out.

25 MR. BRATOVICH: All right.

1 MR. LILLY: Are the statements in this exhibit
2 accurate?

3 MR. BRATOVICH: Yes, with one exception. On
4 Page 1 of my declaration there is a typographical error.

5 MR. LILLY: Where is that?

6 MR. BRATOVICH: On Line 22 it states that the
7 2001-2002 season from October 28th, 2001, to October 1,
8 2002. It actually should read October 29th, not October
9 28th.

10 MR. LILLY: Is that the only correction you
11 have to this exhibit?

12 MR. BRATOVICH: Yes.

13 MR. LILLY: Please very briefly describe what
14 a rotary screw trap is.

15 MR. BRATOVICH: A rotary screw trap is a fish
16 sampling device. It is an eight-foot diameter, conical
17 device supported by a floating platform whereby the cone
18 captures juvenile fish, transfers the fish to a live box
19 where the fish tend to be subsequently identified,
20 examined, enumerated and released back to the river.

21 MR. LILLY: Are rotary screw traps often
22 referred to as RSTs?

23 MR. BRATOVICH: Yes.

24 MR. LILLY: Have RSTs operated in the Lower
25 Yuba River?

1 MR. BRATOVICH: Yes.

2 MR. LILLY: Does Table 1 of your declaration
3 accurately describe the operations of these RSTs?

4 MR. BRATOVICH: Yes.

5 MR. LILLY: Now moving forward to Figure 1 of
6 your declaration, does this figure accurately describe the
7 flows and water velocities that are occurring in the Lower
8 Yuba River during the periods of RST operations?

9 MR. BRATOVICH: For each of the three
10 monitoring seasons during which the RST was in operation,
11 it does present the average flows measured, average daily
12 flows measured at the USGS gauge located near Marysville,
13 and it does present the average water velocities measured
14 at the Hallwood RST.

15 MR. LILLY: Going forward to Figure 2 of your
16 declaration, does Figure 2 accurately describe the numbers
17 of juvenile chinook salmon that were caught by the RSTs on
18 the various days during the sampling periods?

19 MR. BRATOVICH: Yes, it does. It includes
20 counts as well as a few data points which were
21 approximated during periods when large number of juvenile
22 chinook salmon were captured and full counts were not
23 completed.

24 MR. LILLY: Who made those approximations?

25 MR. BRATOVICH: The data records that we have

1 indicate that that was during some of the periods in the
2 first monitoring season when California Department of Fish
3 and Game was operating RST.

4 MR. LILLY: Moving forward to Figure 3 of your
5 declaration, does Figure 3 accurately describe the numbers
6 of juvenile steelhead that were caught by the RSTs on the
7 various days during the sampling periods?

8 MR. BRATOVICH: Yes.

9 MR. LILLY: Moving forward to Figure 4, Figure
10 4 refers to an abundance index for juvenile chinook
11 salmon. Please describe what the abundance index is.

12 MR. BRATOVICH: The RSTs or this RST in
13 particular samples only a portion of the total river flow
14 going past the RST location on any given day. So the
15 abundance index was calculated by determining the portion
16 of the river flow sampled by the RST on a given day and
17 multiplying the fish count for that day by the inverse of
18 the proportion of the total river flow. In other words,
19 if the RST is sampling one-tenth of the river flow, the
20 count was simply multiplied by ten.

21 MR. LILLY: Is that an appropriate thing to do
22 as part of your analysis?

23 MR. BRATOVICH: It is in this instance.

24 MR. LILLY: Now Figure 4 also refers to
25 cumulative distributions of chinook salmon juveniles. Can

1 you please describe what the cumulative distributions are?

2 MR. BRATOVICH: The cumulative distribution is
3 expressed as a percentage of the total abundance estimated
4 -- the total estimated abundance index for the entire
5 season passing this RST on or before a particular day.

6 MR. LILLY: What does Figure 4 show regarding
7 April 21st?

8 MR. BRATOVICH: Well, for each of the three
9 monitoring seasons, '99-2000, 2000 to 2001, 2001-2002
10 monitoring seasons, it shows that an estimated 98, 99 and
11 98 percent of the season's total abundance index of
12 juvenile chinook salmon passed the Hallwood RST before
13 April 21st each of those years respectively.

14 MR. LILLY: Moving forward to Figure 5, in
15 very general terms what is the difference between Figure 4
16 and Figure 5?

17 MR. BRATOVICH: Figure 5 illustrates juvenile
18 chinook steelhead rather than Figure 4 which illustrated
19 juvenile chinook salmon.

20 MR. LILLY: I assume you did not mean chinook
21 steelhead?

22 MR. BRATOVICH: Excuse me, I did not. I meant
23 juvenile steelhead. Pardon me.

24 MR. LILLY: Other than that difference of the
25 species, are the parameters in Figure 4 and Figure 5

1 generally the same?

2 MR. BRATOVICH: Yes, with one obvious
3 exception. There is no cumulative distribution presented
4 for the first monitoring season. That was not presented
5 because sampling was terminated on July 1st, 2000. And
6 looking at the subsequent two seasons, clearly large
7 numbers of juveniles steelhead were moving past the
8 Hallwood RST subsequent to that date, so it is not
9 appropriate to calculate a cumulative distribution for
10 such a truncated sampling period.

11 MR. LILLY: Just to clarify, during that first
12 season this RST was operated by California Department of
13 Fish and Game?

14 MR. BRATOVICH: Yes.

15 MR. LILLY: What does Figure 5 illustrate
16 regarding April 21st?

17 MR. BRATOVICH: Figure 5 illustrates that --
18 actually it illustrates that for the period extending from
19 April 21 through June a relatively small percentage of the
20 cumulative abundance index passed the Hallwood RST. In
21 fact, it illustrates for these two seasons that only 3.3
22 and approximately 13.6 of the entire season's total
23 abundance index estimate moved past the RST during this
24 period extending from April 21 through June 30th.

25 MR. LILLY: Are you familiar with the State

1 Water Resources Control Board Water Right Decision 1644?

2 MR. BRATOVICH: Yes.

3 MR. LILLY: Are you familiar with the minimum
4 instream flow requirements that are specified in Decision
5 1644 for the period of April 21 through June 30th?

6 MR. BRATOVICH: Yes.

7 MR. LILLY: Based on your review of the RST
8 data, do you have an opinion regarding the appropriateness
9 of the instream flow requirements in Decision 1644? And I
10 am referring to the long-term instream flow requirements
11 for the period April 21 through June 30th.

12 MR. BRATOVICH: Yes, I do.

13 MR. LILLY: What is that opinion?

14 MR. BRATOVICH: You mentioned the two critical
15 statements previously in your statement. The two critical
16 statements in D-1644 related to April 21 through June 30th
17 served as the basis for the flow requirements in D-1644.

18 On Page 61, Paragraph 2, the sentence, quote, is:

19 The primary fishery consideration in the
20 April through June period is to provide
21 adequate flows for juvenile chinook salmon
22 and steelhead emigration. (Reading)

23 That apparently is supported by the statement on
24 Page 62, the third full paragraph, second sentence which
25 states, quote:

1 However, the record indicates that
2 emigration of juvenile chinook salmon from
3 the Lower Yuba River begins in late April.
4 It peaks in May and is normally complete
5 by the second week in June. (Reading)

6 Therefore, examination of the data which was not
7 available to the State Board at the time of the drafting
8 of Decision 1644 clearly does not support those
9 assumptions or conclusions in D-1644 based upon this RST
10 information.

11 MR. LILLY: Why do the data not support those
12 conclusions in D-1644?

13 MR. BRATOVICH: Well, because as I just stated
14 for the three monitoring seasons 98 and 99 percent of the
15 juvenile chinook salmon were estimated to pass the
16 Hallwood RST prior to April 21, and only 3.3 and
17 approximately 13.6 percent of the juvenile steelhead
18 passed the Hallwood RST during this time period as well.

19 MR. LILLY: Thank you.

20 I have no further questions for you, Mr. Bratovich.

21 Mr. Baggett, it is up to you. We can proceed with
22 Mr. Aikens now or after lunch.

23 CHAIRMAN BAGGETT: Five minutes or so?

24 MR. LILLY: Approximately.

25 CHAIRMAN BAGGETT: Let's just finish. We will

1 come back and cross.

2 MR. LILLY: Mr. Aikens, please turn on your
3 microphone.

4 MR. AIKENS: It is on.

5 MR. LILLY: Mr. Aikens, please state your name
6 and spell your last name for the record.

7 MR. AIKENS: My name is Curt Aikens. Last
8 name is spelled A-i-k-e-n-s.

9 MR. LILLY: Have you taken the oath for
10 today's hearing?

11 MR. AIKENS: Yes, I have.

12 MR. LILLY: We have not marked this as an
13 exhibit, but I think we are up to 7 now?

14 MR. MONA: Yes.

15 MR. LILLY: We ask that Mr. Aikens' resume
16 which Mr. Mona kindly posted on the website earlier this
17 week be marked as Exhibit 2003-YCWA-7.

18 And, Mr. Aikens, isn't this, in fact, an accurate
19 description of your education and work experience?

20 MR. AIKENS: Yes, it is.

21 MR. LILLY: Do you have State Board Staff
22 Exhibit 6, which is your declaration in front of you?

23 MR. AIKENS: Yes, I do.

24 MR. LILLY: Are the statements in this exhibit
25 accurate?

1 MR. AIKENS: Most of them. I would like to
2 make a couple updates.

3 MR. LILLY: Please do.

4 MR. AIKENS: On Item No. 8, Page 2, Line 4,
5 instead of 9,160, change that to 9,140. On Line 6, change
6 3,134 to 2,898. And on Line 9, change 12,294 to 12,038.

7 MR. LILLY: Why do you need to make these
8 changes?

9 MR. AIKENS: They are basically a clerical
10 input error during the processing of the data.

11 MR. LILLY: The new numbers are the correct
12 numbers?

13 MR. AIKENS: That's correct.

14 MR. LILLY: Just to very briefly summarize
15 your testimony. In general, where is the Dry Creek Mutual
16 Water Company located?

17 MR. AIKENS: Southern Yuba County, south of
18 Highway 65.

19 MR. LILLY: Is Yuba River water presently
20 delivered to the Dry Creek Mutual Water Company?

21 MR. AIKENS: Yes, it is.

22 MR. LILLY: When did those deliveries start?

23 MR. AIKENS: 1998.

24 MR. LILLY: What is the annual delivery amount
25 that is stated in the contract between the Agency and Dry

1 Creek Mutual Water Company?

2 MR. AIKENS: 16,743 acre-feet.

3 MR. LILLY: How much Yuba River water did the
4 Agency deliver to the Dry Creek Mutual Water Company in
5 2001?

6 MR. AIKENS: In 2001, YCWA delivered 2,898
7 acre-feet.

8 MR. LILLY: Did the Dry Creek Mutual Water
9 Company participate in the Agency's in lieu water transfer
10 program in 2001?

11 MR. AIKENS: Yes, it did.

12 MR. LILLY: How did this program work?

13 MR. AIKENS: In lieu water transfer program is
14 where water directions pump groundwater for use on crops
15 that would be irrigated with surface water. In lieu of
16 taking that surface water that surface water is allowed to
17 be transported down river for water transfer purposes.

18 MR. LILLY: What was the amount of the in lieu
19 participation in this program by Dry Creek Mutual Water
20 Company in 2001?

21 MR. AIKENS: It was 9,140 acre-feet.

22 MR. LILLY: Did the Agency deliver Yuba River
23 water to Dry Creek Mutual Water Company in 2002?

24 MR. AIKENS: Yes.

25 MR. LILLY: How much?

1 MR. AIKENS: 6,153 acre-feet.

2 MR. LILLY: Did Dry Creek Mutual Water Company
3 participate in the Agency's in lieu water transfer program
4 in 2002?

5 MR. AIKENS: Yes, it did.

6 MR. LILLY: Did this program work the same as
7 in 2001?

8 MR. AIKENS: In general, yes.

9 MR. LILLY: How much water was subject to the
10 in lieu program in 2002?

11 MR. AIKENS: 5,876 acre-feet.

12 MR. LILLY: Considering both the actual
13 deliveries of Yuba River water to the Dry Creek Mutual
14 Water Company and Dry Creek's in lieu water pumping in
15 2001 and 2002, what would Dry Creek Mutual Water Company's
16 total demands for Yuba River water for which conveyance
17 facilities were in place where they could have received
18 those waters to meet those demands?

19 MR. AIKENS: In 2001, it was 12,038 acre-feet.
20 In 2002, it was 12,029 acre-feet.

21 MR. LILLY: In future years if there is no in
22 lieu groundwater pumping program in a given year, what
23 will Dry Creek Mutual Water Company's total demands for
24 Yuba River water be?

25 MR. AIKENS: Based upon their continuing

1 addition to the distribution system at the freeway,
2 they're bringing on about 900 acre-feet capability this
3 year with \$38,000 worth of distribution work, and I would
4 expect that to continue over the next few years up to a
5 full contract amount.

6 MR. LILLY: That is the amount of 16,000 that
7 you mentioned?

8 MR. AIKENS: 16,740 acre-feet.

9 MR. LILLY: Where is the Wheatland Water
10 District located?

11 MR. AIKENS: Wheatland Water District is
12 located in southern Yuba County, eastern side, north of
13 Highway 65.

14 MR. LILLY: Is Yuba River water presently
15 delivered to Wheatland Water District?

16 MR. AIKENS: No, it is not.

17 MR. LILLY: Why not?

18 MR. AIKENS: There is no surface water
19 delivery system.

20 MR. LILLY: What types of water supplies
21 presently are used in the Wheatland Water District?

22 MR. AIKENS: Primarily groundwater.

23 MR. LILLY: Are these groundwater supplies
24 accurate as a long-term supply? Excuse me, are these
25 groundwater supplies adequate as a long-term supply?

1 MR. AIKENS: No, they are not.

2 MR. LILLY: Why not?

3 MR. AIKENS: They have had water quality
4 problems where wells have been shut down. It is also
5 generally regarded as having some groundwater depletion
6 and reduced groundwater levels out there.

7 MR. LILLY: Does Yuba County Water Agency have
8 a proposed project to deliver water to the Wheatland Water
9 District?

10 MR. AIKENS: Yes, we do.

11 MR. LILLY: In general terms please describe
12 this project.

13 MR. AIKENS: It is an extension of our main
14 canal. It starts off just below North Field Road. It
15 takes water through two pumping stations into the
16 Wheatland Water District area.

17 MR. LILLY: What is the estimated cost of this
18 project?

19 MR. AIKENS: About \$6.3 million.

20 MR. LILLY: What are the proposed funding
21 sources for this project?

22 MR. AIKENS: Currently we have notice of a
23 grant for 3.15 million out of Prop 13 funds and YCWA Board
24 has set aside an additional \$3.3 million to complete this
25 project.

1 MR. LILLY: Is that 3.3 million derived from
2 water transfer revenues that the Agency received?

3 MR. AIKENS: Yes, it is.

4 MR. LILLY: What is the proposed construction
5 schedule for this project?

6 MR. AIKENS: Proposed construction schedule is
7 we complete an environmental process by summer of this
8 year. Obtain the necessary permits to construct the canal
9 system/distribution system by early next year, and start
10 construction in 2004.

11 MR. LILLY: I know that there was some numbers
12 listed during the 2000 hearing, but what is the
13 approximate estimated total acre-feet per year that would
14 be delivered to the Wheatland Water District when this
15 project is completed?

16 MR. AIKENS: In the grant application we have
17 36,000-and-some-change acre-feet.

18 MR. LILLY: I have no further questions.

19 CHAIRMAN BAGGETT: Thank you.

20 We are off the record.

21 (Luncheon break taken.)

22 ----oOo----

23

24

25

1 AFTERNOON SESSION

2 ---oOo---

3 CHAIRMAN BAGGETT: Back on cross-examination
4 of Yuba County Water Agency witnesses. SYRCL is first.
5 Thirty minutes is what we have allowed for cross.

6 MR. HUTCHINS: Thank you. My name is Todd
7 Hutchins. I am with South Yuba River Citizens League.
8 And my address, I am not sure it made it into the record,
9 is 216 Main Street, Nevada City, California. The ZIP is
10 95959.

11 Thank you for giving us the opportunity to be here
12 today.

13 MR. LILLY: Mr. Baggett, before Mr. Hutchins
14 begins, I'd just like clarification. I don't know what
15 the Board's rules are, whether attorneys who are not
16 admitted to Bar to practice in California are allowed to
17 question here. I believe Mr. Hutchins is in that
18 category.

19 MR. FRINK: The Board doesn't have a rule
20 restricting who can participate in cross-examination.
21 Ordinarily, we ask that it be a single representative
22 party, but it is frequently not an attorney.

23 CHAIRMAN BAGGETT: In the IID hearings we had
24 Mr. Du Bois cross-examining witnesses on behalf of the
25 Farm Bureau. We had a number of nonattorney farmers,

1 basically.

2 MR. LILLY: I just wanted the clarification.

3 I appreciate that. Thanks.

4 MR. HUTCHINS: Mr. Lilly, I am, in fact, have
5 been a practicing attorney for a number of years, but
6 fairly new to California. So I'm still waiting for the
7 licensure proceedings to wrap up.

8 ---oOo---

9 CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

10 BY SOUTH YUBA RIVER CITIZENS LEAGUE

11 BY MR. HUTCHINS

12 MR. HUTCHINS: Mr. Aikens, I have one question
13 for you concerning your testimony, actually a couple of
14 questions.

15 Were you paying attention when the various parties
16 were making opening statements this morning?

17 MR. AIKENS: Yes, I was.

18 MR. HUTCHINS: I believe it was Mr. Bezerra
19 who stated that the evidence in your declaration and the
20 evidence that stems from your declaration during your
21 testimony just confirms evidence that was presented in
22 2000 concerning water demand.

23 Would you agree with that statement?

24 MR. AIKENS: I am not sure if that was Ryan or
25 not, but we presented evidence. It wasn't me in 2000, but

1 it was other representatives of YCWA about water demands.
2 We did present evidence about the Dry Creek and Wheatland
3 Water District coming on line and at this point in time
4 these projects have moved much farther forward.

5 For example, Dry Creek is actually taking service.
6 They have expanded deliveries just as was stated. And the
7 Wheatland Water District Project has made substantial
8 steps towards construction of the project.

9 MR. HUTCHINS: These steps are moving forward
10 consistent with the projections that were made during
11 2000; is that correct?

12 MR. AIKENS: I believe so.

13 MR. HUTCHINS: Thank you very much.

14 Mr. Mitchell, I have a couple of questions for you
15 as well. I would like to confirm, please, that your
16 testimony today and the testimony in your declaration
17 concern fall-run chinook; is that correct?

18 MR. MITCHELL: That's correct.

19 MR. HUTCHINS: And they concern fall-run
20 chinook only; is that correct?

21 MR. MITCHELL: Pardon me?

22 MR. HUTCHINS: They concern fall-run chinook
23 only; is that correct, as opposed to other species of
24 fish?

25 MR. MITCHELL: Yes, I think that is fair to

1 say. But the focus was trying to get estimates on
2 fall-run, but may include spring-run as well.

3 MR. HUTCHINS: You're aware, are you not, that
4 Central Valley steelhead and Central Valley spring-run
5 salmon are listed under the federal and one of the species
6 is listed under the California Endangered Species Act; is
7 that right?

8 MR. MITCHELL: Yes, I am aware of that.

9 MR. HUTCHINS: Thank you very much.

10 Mr. Bratovich, good afternoon.

11 MR. BRATOVICH: Good to see you.

12 MR. HUTCHINS: I have a few questions for you
13 as well.

14 You had mentioned in your declaration and then
15 during your testimony this morning that the RST data
16 concerned juvenile fish; is that right?

17 MR. BRATOVICH: Yes.

18 MR. HUTCHINS: It is my understanding, and
19 please correct me if I am wrong, that it is common among
20 fisheries biologists to distinguish between fry, which I
21 guess would be included within a broader universe of
22 juvenile fish, versus post fry juvenile fish and that the
23 term "juvenile" is ordinarily used to refer to pre-adult
24 fish that are past the fry stage; is that correct?

25 MR. BRATOVICH: There are a variety of

1 conventions. I am using the term "juveniles" to indicate
2 nonadult, relatively small fish. So in essence it would
3 constitute the sum total of what could commonly be
4 referred to as post emergent fry, fry, juveniles, silvery
5 par, pars, smolts, what have you.

6 MR. HUTCHINS: Thank you.

7 You would agree with me, would you not, that there
8 is a greater proportion of fish that you would consider to
9 be fry that are outmigrating from the Yuba River before
10 April 21 relative to those fish that are outmigrating
11 after April 21; is that right?

12 MR. BRATOVICH: Let's see, I am trying to
13 understand. If we are talking about juvenile chinook
14 salmon -- could you restate your question?

15 MR. HUTCHINS: I'm sorry, probably wasn't the
16 most articulate of phrasing.

17 There are more fry relative to other juvenile fish
18 outmigrating before April 21 than after April 21; is that
19 right?

20 MR. BRATOVICH: I didn't take a size
21 distinction of fry. I have examined the length data of
22 the fish captured in the rotary screw traps. And for
23 juvenile chinook salmon I didn't -- specifically I haven't
24 looked at size distributions, and I didn't arbitrarily
25 draw a line at a certain length to distinguish fry from

1 larger individuals.

2 But I was interested in this very question because
3 there is some conventional wisdom that perhaps larger
4 individuals go out later in the year. I presume that is
5 where we are going with this. I did look at that. I
6 tried to look through -- I did the literature through the
7 studies throughout the Central Valley as what constitutes
8 a smolt. Because oftentimes you will hear discussion that
9 a smolt, as indicated by being a larger fish, could have
10 differential survivability relative to the post emergent
11 fry or the smaller fish. That is an issue that we were
12 concerned about and did look at.

13 I had a little bit difficult time, though, finding
14 that magic size threshold that conventionally
15 distinguishes smaller juveniles from smolts. In fact,
16 that is somewhat of a misnomer. Smolts and smoltification
17 really reflect both physiologic and behavioral
18 adaptations. So it is really a matter of simplistic
19 convenience to throw a size threshold on a smolt. But I
20 did look to see if that could be determined. The best
21 thing I could find was from Peter Moyle 2002 Inland Fishes
22 of California. And there was a statement in there that
23 said specifically chinook salmon, juvenile chinook salmon,
24 leaves the tributary streams and goes to the Sacramento
25 River and enters the upper reaches of the Delta and the

1 estuary where they become smolts between 80 and a hundred
2 millimeters, and enter the saline environment.

3 The best I could come up with is that you can
4 distinguish a smolt somewhere around 80 millimeters or so.
5 So I did look at that. And I looked at the lengths of the
6 juvenile chinook salmon measured at the Hallwood RST
7 during the period April 21 through June 30th, relative to
8 the period before that and calculated both average lengths
9 and also illustrated the range of lengths.

10 So in essence I know there are some larger
11 individuals that are captured at the RST during the fall
12 and winter period. Relatively larger individuals, up to
13 over 130 millimeters in length, which is, I think everyone
14 agrees, chinook smolt. Sizes do increase as an average
15 size over the spring period. So in that instance that is
16 correct. And the average size captured at the RST of
17 juvenile chinook salmon does increase from the winter
18 period through the spring period, including April, May,
19 June.

20 So, yes, we are seeing larger average size, although
21 our ranges are pretty similar, a larger average size
22 April, May and June. That may be due to larger
23 individuals moving downstream and being captured or the
24 fact that most of the smolt, post emergent fry, have
25 already left the season, have gone through. That question

1 remains and is very difficult to answer.

2 MR. HUTCHINS: If I can just clarify. I
3 appreciate your explanation. If I could sum up and
4 clarify. It is true that the small fry tend to leave the
5 system in greater proportions earlier in the year relative
6 to the smolts that are leaving in greater relative
7 proportions to the fry later on in the spring?

8 MR. BRATOVICH: I think as a general rule that
9 is true. Looking at the number of fish over 80
10 millimeters in length, my rough calculations indicate that
11 for the period prior to April 21, over all three seasons,
12 relative to the period of April 21 to June 30th, roughly
13 three to five times more fish greater than 80 millimeters
14 in length were captured during the April 21 through June
15 30th period than previously. However, as I testified on
16 my direct, 98 or 99 percent of all fish left prior to
17 April 21. So you have to bear that in mind.

18 MR. HUTCHINS: This leads me to another
19 question. Rotary screw traps are not a hundred percent
20 efficient in capturing fish that are moving downstream; is
21 that correct?

22 MR. BRATOVICH: That is correct.

23 MR. HUTCHINS: Moreover, there are
24 differential rates of efficiency depending on the size of
25 the fish that you are capturing, which is to say if I can

1 restate the question, that a rotary screw trap is actually
2 more efficient at catching smaller fish than it is at
3 catching larger fish; is that correct?

4 MR. BRATOVICH: It is not a yes or no answer.
5 Can I explain?

6 MR. HUTCHINS: Please do.

7 MR. BRATOVICH: The best way to determine
8 these things are first to conduct site-specific and
9 size-specific mark/recapture experimentation to estimate
10 capture efficiency. For the monitoring program that's
11 been in place on the Yuba River with RSTs, capture
12 efficiency estimation procedures have only been
13 established during the last half of the last monitoring
14 season, and it was only really for juvenile steelhead. So
15 we don't have site-specific, meaning the Yuba River, or
16 size-specific, meaning over a range of sizes, at all for
17 juvenile chinook salmon.

18 So I really can't say that is correct for the Yuba
19 River. But I will grant you that I think it makes
20 intuitive sense that larger individuals have greater
21 swimming capabilities and, because they have greater
22 swimming capabilities, they have greater avoidance
23 capabilities, either from entering a device such as an RST
24 or a canal or some other system that presents some kind of
25 danger or from predators themselves.

1 MR. HUTCHINS: If I understand you correctly,
2 what you are saying is that we simply lack data that would
3 let us know how many large fish, how many smolts, are
4 outmigrating from the Yuba River after April 21st, based
5 upon RST data; is that right?

6 MR. BRATOVICH: That is not totally accurate.
7 I would say the data that we do have includes some larger
8 fish that are captured in somewhat higher proportions
9 during that time period because presumably there are
10 larger fish having some growth and some rearing in the
11 river and outmigrating at a later date. Clearly, it seems
12 to be a smaller percent, a very small percent, of the
13 population. As I indicated, a vast majority of fish for
14 the entire year have gone prior to April 21, but there are
15 always larger individuals on an average during April 21
16 through June 30th period.

17 How efficient the RSTs are at capturing those larger
18 individuals or even, frankly, those smaller individuals at
19 this time cannot be quantitatively determined given the
20 data that I am aware of.

21 MR. HUTCHINS: When you say then that the vast
22 majority of fish, of juvenile salmon, have outmigrated
23 from the Yuba River by April 21st, we really don't have
24 any hard, concrete data on which to base that conclusion
25 of other than the rotary screw trap data; is that correct?

1 MR. BRATOVICH: I am not aware of any. It is
2 my opinion that the rotary screw trap data is the best
3 available data for the Yuba River.

4 MR. HUTCHINS: Mr. Bratovich, are you familiar
5 with the expert testimony that Yuba County Water Agency
6 submitted studies by Jones & Stokes that were submitted in
7 the 1992 phase of the D-1644 hearings?

8 MR. BRATOVICH: Generally familiar with the
9 administrative record. Could you be specific?

10 MR. HUTCHINS: I don't happen to have the name
11 of the study with me. It is Yuba County Water Agency
12 Exhibit No. 20 from 1992. It is actually not one study so
13 much that I am concerned about; it's some of the
14 conclusions and some of the statements that are found in
15 the study.

16 In particular, Yuba County Water Agency presented
17 expert testimony from Jones & Stokes consultants
18 indicating that -- and this is based on outmigration data
19 from a Hallwood-Cordua fish screen, for example. And
20 there are other examples throughout the study -- that
21 smolts continue to outmigrate from -- I am talking about
22 salmon smolts -- continue to outmigrate from the Yuba
23 River well into May and, in fact, even into June.

24 Are you familiar with those data?

25 MR. BRATOVICH: No, I am not.

1 MR. HUTCHINS: Again, in Jones & Stokes 1992
2 report, I believe again this is Yuba County Water Agency
3 Exhibit No. 20 from 1992, somewhere in the vicinity of
4 Page 3 -- Chapter 3, Page 23, there are statements to the
5 effect, and I am paraphrasing here, there are statements
6 to the effect that for the fish that spawned above the
7 Daguerre Point Dam, peak outmigration actually occurs
8 during the month of May.

9 Are you familiar with those statements?

10 MR. LILLY: I object if he is going to ask the
11 witness about a document and not let the witness see the
12 document. Especially if he says he's paraphrasing
13 something. I think it is only fair to the witness that he
14 actually see the document that is being asked about.

15 MR. HUTCHINS: Rather than asking about a
16 document, instead I will simply ask you: Are you familiar
17 with any data indicating that fish spawned --

18 CHAIRMAN BAGGETT: Sustained.

19 MR. HUTCHINS: -- above Daguerre Point Dam at
20 a peak outmigration period during the month of May?

21 MR. BRATOVICH: Mr. Hutchins, I'm a little bit
22 perplexed here because it is hard for me to express an
23 opinion on data I haven't reviewed. I can bring your
24 attention to Page 65 of Decision 1644 and the statement
25 pertaining to this specific question.

1 MR. HUTCHINS: My question was whether you had
2 reviewed those data and since you say you did not, I thank
3 you for your answer.

4 I believe I have one or two questions for you if you
5 will kindly bear with me for just a moment longer.
6 Your analysis concerning RST data is based on three
7 monitoring seasons only, right?

8 MR. BRATOVICH: Yes, sir. Two and a half,
9 actually.

10 MR. HUTCHINS: During those monitoring
11 seasons, flows in the Lower Yuba were generally, if not
12 uniformly, above the minimum instream flows required by
13 D-1644; is that correct?

14 MR. BRATOVICH: Can we put up Figure 2 or 3.
15 Any one of these will do. Let's not do Figure 1; let's go
16 to Figure 2 or 3 or 4 or 5 and look at counts. That will
17 work right there.

18 That is for steelhead count, but that doesn't
19 describe the flows that occurred during these overall
20 monitoring seasons. And really the three monitoring
21 seasons, as I said two and a half, represented by widely
22 different flow regimes. In essence, the first year of
23 monitoring extremely high flows. Those were extremely
24 high flows.

25 The second middle years, relatively low. And the

1 third year is intermediate to those years. They did vary
2 widely.

3 MR. HUTCHINS: On average would you agree with
4 the statement that the flows that occurred during these
5 two and a half monitoring seasons are flows that are
6 greater than those required by D-1644 interim flow regime?

7 MR. BRATOVICH: My eyesight isn't as good as
8 it once was. I am having a hard time trying to look at
9 the lines up there and see, compare what they are.

10 But you are probably correct, that they are
11 generally higher. Certainly the first year is generally
12 higher during that time period and so is the last year. I
13 would look more carefully at the middle year. But in any
14 event that is in the record. I am sure that Board and
15 staff will look at it without having to rely on
16 representations.

17 MR. HUTCHINS: Two more things. One, I wanted
18 to confirm that your answer is based on the rotary screw
19 trap data did not consider flow needs of fish downstream
20 of the Yuba River; is that correct?

21 MR. BRATOVICH: That's correct.

22 MR. HUTCHINS: Your analysis did not consider
23 any life stages of salmon and chinook other than the
24 outmigration of juveniles; is that right?

25 MR. BRATOVICH: If you mean chinook salmon and

1 steelhead out only, yes, that is correct.

2 CHAIRMAN BAGGETT: Hold the record a minute.

3 (Reporter checks computer.)

4 CHAIRMAN BAGGETT: Back on the record.

5 MR. HUTCHINS: Mr. Bratovich, I just want to
6 confirm your analysis did not consider -- your analysis of
7 the rotary screw trap data did not consider and you did
8 not make any conclusions with regard to implications of
9 those data with respect to American shad, with respect to
10 the American shad fishery in the Yuba River and
11 downstream; is that correct?

12 MR. BRATOVICH: Yes. In referring to Staff
13 Exhibit 5 for this; that is correct?

14 MR. HUTCHINS: Thank you very much.

15 I believe that's all that I have to Mr. Aikens and
16 Mr. Mitchell and Mr. Bratovich.

17 I thank you very much.

18 CHAIRMAN BAGGETT: Thank you.

19 Brophy Water District, have any cross?

20 MR. BARTON: No.

21 CHAIRMAN BAGGETT: Browns Valley.

22 MR. BEZERRA: No, Mr. Baggett.

23 CHAIRMAN BAGGETT: South Yuba, et al.

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1 CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

2 BY SOUTH YUBA WATER DISTRICT

3 BY MR. MINASIAN

4 MR. MINASIAN: Mr. Bratovich, will you bear in
5 mind that Member Carlton and Chairman Baggett may have
6 known about the source -- may not know because they did
7 not participate in the testimony in 1992 and 2000 in
8 regard to the source of data in regard to outmigration
9 patterns before the RSTs went into place.

10 For the period of roughly 1977 through 2000 what was
11 the source of data and the method of estimating the
12 outmigration patterns and sizing of fish on the Yuba
13 River?

14 MR. BRATOVICH: I am aware from the record
15 that previous testimony, which was not my testimony,
16 utilized to some degree the Hallwood/Cordua screen data.

17 MR. MINASIAN: Was that, in your estimation --
18 Mr. Mitchell, let me ask you because I know you're
19 experienced with this. In your estimation was that a site
20 that was operated on a continuous basis in a scientific
21 fashion to gauge the numbers exported or emigrating out of
22 the river and the size?

23 MR. MITCHELL: No, it was not done in a
24 scientific fashion, and, therefore, there was some
25 cautions that we had identified at the time. However, it

1 was operated continuously during the spring season in many
2 years and provided what we believe is a good indication of
3 the timing of migration of smolt-size salmon, chinook
4 salmon.

5 MR. MINASIAN: Why is the RST data better than
6 the Hallwood fish trap data?

7 MR. MITCHELL: Well, the RST is designed as a
8 conventional fish capture device and can be calibrated
9 with appropriate mark and capture testing. In the same --
10 by the same token the Hallwood/Cordua canal could just as
11 well been calibrated, so to speak, with the same methods.
12 But the rotary screw trap is actually a fishery capture
13 device, so it is specifically designed for the capture of
14 fish and operates to maximize the efficiency of those
15 captures.

16 MR. MINASIAN: For the benefit of the Members
17 of the Board, the Hallwood/Cordua trap is located off the
18 river about a mile down an irrigation ditch, is it not?

19 MR. MITCHELL: That's correct.

20 MR. MINASIAN: There is no power source to
21 that trap, is there or was there?

22 MR. MITCHELL: No.

23 MR. MINASIAN: As a matter of fact, somebody
24 had to go out there and operate a generator on a 24-hour
25 basis to be able to measure the number of fish?

1 MR. MITCHELL: That's correct.

2 MR. MINASIAN: Do you remember testimony to
3 the effect that the trap wasn't operated on a continuous
4 basis so that the early fish could be captured because of
5 economic concerns on the part of the Department of Fish
6 and Game?

7 MR. MITCHELL: That is correct, as well as
8 there was no need because these diversions had not started
9 in the early winter or early spring.

10 MR. MINASIAN: The diversions and the amount
11 of water moving down this mile channel determined roughly
12 whether you could estimate the number of fish. If there
13 was no irrigation demand, you wouldn't be pulling fish
14 into that?

15 CHAIRMAN BAGGETT: Mr. Cunningham.

16 MR. CUNNINGHAM: Mr. Baggett, my apologies,
17 but strange as this sounds, I would like to object to this
18 line of questioning. This goes so far beyond the line of
19 direct testimony and the declarations provided by Mr.
20 Bratovich and Mr. Mitchell as to be, I am sorry,
21 Mr. Minasian, it is ludicrous. He is now essentially
22 having them regenerate testimony this Board received, took
23 into consideration years ago having to do with the
24 Hallwood/Cordua diversion screen, not trap, and none of
25 that was discussed in Mr. Bratovich's or Mr. Mitchell's

1 testimony. I realize you're generous, but this is beyond
2 generous.

3 CHAIRMAN BAGGETT: Do you have a response?

4 MR. MINASIAN: You want an offer of proof. We
5 are getting data from a new source and that Court has
6 asked you to review that new source in regard to its
7 significance, the data significance. How can you do that
8 without being aware of what is in the record now in regard
9 to the same attempt to recreate information about the
10 migration pattern?

11 MR. CUNNINGHAM: Mr. Baggett, if Mr. Minasian
12 wants to make arguments, I think you are going to provide
13 us an opportunity to oral or rewritten closing arguments,
14 and he is more than welcome to make such a comparison of
15 already existing data with that being provided by
16 Mrs. Bratovich and Mitchell. This is not the time or
17 place essentially for Mr. Minasian to testify and then ask
18 the witness isn't that true. This is not their testimony.
19 This is his testimony. And I suggest, again, this is an
20 inappropriate forum for that.

21 CHAIRMAN BAGGETT: I would concur. Sustain
22 the objection.

23 This Board is aware of the record. Although
24 Mr. Carlton wasn't here, I certainly was here and voted
25 for the previous order and am aware of that record and

1 have visited the site as the parties and attorney are well
2 aware. We can go back and review that record as pointed
3 out. You will have an opportunity to make in your closing
4 comments or however we decide to end this proceeding, to
5 tie those pieces together.

6 MR. MINASIAN: Mr. Baggett, are you
7 representing that you read the record from the 1992
8 hearings and reviewed the exhibits personally?

9 CHAIRMAN BAGGETT: I am aware of the record
10 and the exhibits. I haven't read every single page. I
11 doubt if very many people in this room have read every
12 single page. I am familiar with the record, yes.

13 MR. MINASIAN: Mr. Bratovich, you are also
14 aware of the fact that Decision 1644 asked for certain
15 work to be done and studies to be done in regard to what
16 we call the south irrigation diversion?

17 MR. BRATOVICH: What specifically are you
18 referring to?

19 MR. MINASIAN: Remember the portions of
20 Decision 1644 which opined that there may be a fish loss
21 at the south diversion point?

22 MR. BRATOVICH: I remember those discussions.
23 I read the notice for this hearing, and I really focused
24 my preparation and my testimony on Staff Exhibit 5. I
25 don't recall clearly what you are referring to, what the

1 arguments were.

2 MR. MINASIAN: That was preliminary to the
3 question of does Figure 2 basically show the great
4 majority of juvenile fish are outmigrating at an earlier
5 time than was understood at the time of the close of
6 record in regard to the 2000 hearing?

7 MR. BRATOVICH: If you can state for me what
8 the statement was at the close of the record regarding
9 this specific consideration, I'll be able to respond. But
10 what I can tell you is, again, 98, 99 and 98 percent of
11 all juvenile chinook salmon captured were captured prior
12 to April 21 for each of these three years respectively.

13 MR. MINASIAN: Is it generally true that the
14 irrigation diversions at the south diversion begin in
15 approximately the middle of April?

16 MR. BRATOVICH: I have limited understanding
17 of the operations of the agricultural deliveries, but that
18 is my general understanding, is that the irrigation season
19 is spring to fall; that's correct.

20 MR. MINASIAN: Nothing further.

21 CHAIRMAN BAGGETT: Thank you.

22 Mr. Cunningham, Fish and Game.

23 MR. CUNNINGHAM: Thank you, Mr. Baggett.

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1 CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY
2 BY DEPARTMENT OF FISH AND GAME
3 BY MR. CUNNINGHAM

4 MR. CUNNINGHAM: Mr. Chairman, Mr. Carlton,
5 Bill Cunningham, Deputy Attorney General for the
6 Department of Fish and Game.

7 Messers. Mitchell and Bratovich, welcome again.
8 It's been a couple of years. Mr. Aikens, pleasure to see
9 you, sir. I have a couple of quick questions for Mr.
10 Aikens. Let me deal with that first because of the
11 different nature of the two testimonies, I guess, very
12 quickly.

13 Mr. Aikens, in your testimony you talked about two
14 different developments that have recently occurred, one
15 having to do with the Dry Creek Water District and one
16 having to do with Wheatland Water District.

17 Can I ask you, it is my understanding that
18 essentially that works for both districts are being
19 developed to transport water from Yuba County Water
20 Agency's diversion facility to within these districts; is
21 that true?

22 MR. AIKENS: Let me give a little
23 clarification. The main canal system to the Dry Creek
24 Mutual Water Company has been built. The main
25 distribution system has been built within Dry Creek.

1 There are additional distribution systems that need to be
2 built to serve some unserved lands at this point in time.

3 As far as Wheatland Water District goes, there are
4 no canals going from our existing main canal to the
5 Wheatland Water District territory. That is under design
6 and planning, and we did receive approval grant moneys
7 towards that project.

8 MR. CUNNINGHAM: To your knowledge, do Dry
9 Creek Water District and Wheatland Water District exist as
10 separate legal entities?

11 MR. AIKENS: Yes, they do at this point in
12 time. At one point in time they were considered Wheatland
13 Water District and its attachment. Wheatland Water
14 District did extend below Highway 65 and those farmers
15 down there got together and formed Dry Creek Mutual Water
16 Company and came to the Water Agency and asked for surface
17 water project to be built to serve that area.

18 MR. CUNNINGHAM: Let me ask questions of each
19 of the two districts separately, then. To the extent
20 there are additional developments being made for the Dry
21 Creek Water District, who was funding those developments?

22 MR. LILLY: I am going to object. I don't
23 know whether Mr. Cunningham is doing this on purpose or
24 not, he keeps calling it the Dry Creek Water District, and
25 it is not. It is Dry Creek Mutual Water Company and it

1 would be nice if he got it right.

2 CHAIRMAN BAGGETT: We'll note that for the
3 record.

4 MR. CUNNINGHAM: I'll take that under
5 advisement, Mr. Baggett.

6 Thank you, Mr. Lilly.

7 MR. AIKENS: Please, restate the question.

8 MR. CUNNINGHAM: Mr. Aikens, who is funding
9 Dry Creek Mutual Water Company's water development?

10 MR. AIKENS: Which water development are you
11 talking about?

12 MR. CUNNINGHAM: The ones that are currently
13 expanding their system, for example.

14 MR. AIKENS: These are Dry Creek landowners,
15 farmers that are funding those developments.

16 MR. CUNNINGHAM: Is Yuba County Water Agency
17 providing any funding for any of these developments?

18 MR. AIKENS: Not at this point in time.

19 MR. CUNNINGHAM: Did it in the past?

20 MR. AIKENS: We provided grant and loan
21 funding for construction of the overall project, including
22 distribution systems. Some individual distribution
23 systems are the responsibility of the individual landowner
24 or farmers to complete.

25 MR. CUNNINGHAM: Do you have a statutory or

1 contractual obligation to provide this funding to aid an
2 independent water company to develop its water use?

3 MR. AIKENS: We have the Yuba County Water
4 Agency Act which basically says that our mission is to
5 enhance the beneficial use of water within Yuba County and
6 that is the process which we have used to help these
7 districts to build their systems and use surface water.

8 MR. CUNNINGHAM: Let me ask the questions
9 about the Wheatland water systems. Are you currently
10 providing funding for development of any water
11 transportation system to or water usage system within the
12 Wheatland?

13 MR. AIKENS: We are providing funding in terms
14 of an ongoing planning effort to do so. We are in the
15 process of working out a water sales service agreement
16 with Wheatland Water Districts, and that would specify
17 exactly how we go forward from here on out for funding.

18 MR. CUNNINGHAM: Do you currently have a water
19 sales agreement with Wheatland?

20 MR. AIKENS: We have a draft one in place. In
21 fact, we are meeting on it next week to start finalizing
22 the agreement.

23 MR. CUNNINGHAM: Do you currently, presently
24 have any contractual obligation to deliver water to
25 Wheatland at all?

1 MR. AIKENS: No contracts, no obligations. We
2 have a long-term commitment, the agency does, to provide
3 surface water to the Wheatland Water District area. That
4 has been the direction of the Board to move forward. The
5 Board has always approved funding to move these
6 preliminary phases forward, to get a project in operation.

7 MR. CUNNINGHAM: Does the Yuba County Water
8 Agency contemplate that they will be reimbursed for any of
9 these investments in either the Wheatland or Dry Creek
10 systems?

11 MR. AIKENS: Yes.

12 MR. CUNNINGHAM: How?

13 MR. AIKENS: We form a loan agreement for the
14 amount that the Water Agency loans to the water districts,
15 and that specifies repayment of capital that the agency
16 has lent to construct the project.

17 MR. CUNNINGHAM: Thank you.

18 Biologists. Mr. Mitchell, let me ask you some
19 questions very briefly about your testimony.

20 A couple of points of clarification, please. On
21 your attachments to the declaration -- let me be sure I
22 have the right exhibit. Exhibit D, it is a graphic
23 representation of an annual fall-run chinook salmon
24 spawning escapement, and it has a variety of bars
25 representing apparently numerical returns of salmon in the

1 Lower Yuba River. I notice in looking at Exhibit or
2 Attachment D or Exhibit D to your declaration that there
3 are some dark bars starting at about 1995 through to the
4 present year, that according to the legend are actual
5 counts.

6 Can you tell me is this -- did you count 31,000 dead
7 bodies?

8 MR. MITCHELL: No. That actual count is
9 probably a -- could have been better phrased as actual
10 estimates, because we did not count every fish.

11 MR. CUNNINGHAM: Estimates -- I am sorry,
12 you're comparing -- I wonder why you would distinguish
13 them because your other legend indicates that there are
14 other bars which clearly reflect estimated counts.

15 Is there a distinction between the estimated counts
16 and those you identified as actual counts?

17 MR. MITCHELL: Yeah. Here again I think there
18 is confusion. These were not the best legend captions.
19 The estimated count refers to the use of the assumption
20 that 15.5 percent of the run was assumed to be spawning
21 above Highway 20. So the light color bars are the total
22 estimate when that assumption is applied.

23 The dark bar is actually the estimates that we made
24 based on actual surveys of that reach, and so I do
25 apologize for the confusion here because those are not

1 what I would call the best legend captions.

2 MR. CUNNINGHAM: What I am looking at again is
3 Exhibit D, and I see that there are pairs of bars for each
4 year, one of them a light colored bar without lines and
5 the other a dark color bar. The light colored bar is a
6 corrected estimate using this 15 percent additional
7 number; is that what you are doing to arrive at -- tell me
8 again the difference between light colored bars and the
9 dark colored bars.

10 MR. MITCHELL: To answer your first question,
11 that is not correct. The light colored bars represent the
12 estimate that would be generated if you had assumed that
13 15 and a half percent of the run spawned above Highway 20
14 rather than including the actual estimate based on actual
15 surveys.

16 The dark bars are our actual estimates that we
17 developed from actual surveys at that reach. Had we used
18 -- then basically we are comparing that number with the
19 estimate that you would get in that same year if you
20 instead assumed that that area was the -- the number of
21 fish spawning in that area was 15 and a half percent of
22 the run.

23 MR. CUNNINGHAM: Have any attempts been made
24 in these two graphs -- essentially D is the present graph
25 you are offering, the new updated graph. Has any effort

1 been made to suggest how these new actual estimates
2 correlate with the early data, that data before 1994 or
3 so, and again those data provided mostly preproject before
4 about 1973? What I see is a bar graph that suggests I
5 compare, for example, the year 1963 with the year 2002.
6 But what assurance am I provided through this graph that
7 the numbers you are providing as estimates somehow
8 correlate between those two years?

9 MR. MITCHELL: You are going to have to phrase
10 the question in a more direct way, please.

11 MR. CUNNINGHAM: You earlier testified that
12 you were at least knowledgeable when you stated in your
13 declaration about how the fall-run escapement was
14 calculated or derived preproject.

15 Isn't that true, you told us how it was done?

16 MR. MITCHELL: Yes.

17 MR. CUNNINGHAM: I believe it was essentially
18 weekly surveys, although we are sure how many weeks in
19 each year, done by the Department of Fish and Game looking
20 for carcass counts.

21 MR. MITCHELL: That is correct.

22 MR. CUNNINGHAM: That following the project a
23 similar methodology was followed for a significant period
24 of time. But for an extended period of time the
25 understanding was always done that these surveys were done

1 only for a limited geographical location; isn't that true?

2 They were not none above Rose Bar; isn't that true?

3 MR. MITCHELL: That is true for many of the
4 years prior to 1990 when the Department of Fish and Game
5 was doing surveys, yes.

6 MR. CUNNINGHAM: So what I have is -- now you
7 are telling me that at least the more recent studies,
8 including those done in the last two years, reflect a
9 different methodology again; is that correct?

10 MR. MITCHELL: No. The methodology, the basic
11 methodology is the same. The difference is that we have
12 expanded the survey area to include the upper reach.

13 MR. CUNNINGHAM: I apologize for misphrasing.
14 It is my understanding that when you do a research
15 protocol and you change one variable, you must acknowledge
16 the change of that variable; isn't that true?

17 MR. MITCHELL: Yes.

18 MR. CUNNINGHAM: One of the variables that has
19 changed in the current study for fall escapement from
20 those that were done, for example, 30 years ago, is you
21 are looking at a geographically larger area in deriving
22 your estimates; isn't that true?

23 MR. MITCHELL: That's correct. And I will add
24 that that is the reason why we present the other
25 alternative estimates which is based on Fish and Game's

1 assumption which had been applied for many years prior to
2 that. Because of the -- logically using that same
3 assumption would provide data that is more comparable,
4 somewhat more comparable than the actual estimate.

5 MR. CUNNINGHAM: That is where I wanted to go
6 with this. That is the light colored bar that parallels
7 your dark bar?

8 MR. MITCHELL: Yes.

9 MR. CUNNINGHAM: Where in your Exhibit C,
10 which is a numerical summation of your escapement, do I
11 see the numbers provided for the light bar for the years
12 2000, 2001 and 2002?

13 MR. MITCHELL: They are not presented in
14 Exhibit C.

15 MR. CUNNINGHAM: So if I look at Exhibit C and
16 I listen to an earlier argument that as made in opening
17 arguments that the numbers now reflect larger escapement,
18 that is not necessarily so. The numbers provided here are
19 essentially a different apple or a completely different
20 vegetable than what we were provided earlier. You are
21 telling me that -- you're shaking your head no.

22 MR. LILLY: Wait, wait, wait.

23 MR. CUNNINGHAM: Let me reask the question.

24 CHAIRMAN BAGGETT: Could you ask questions
25 now?

1 MR. CUNNINGHAM: I apologize.

2 CHAIRMAN BAGGETT: It is very difficult for us
3 to follow. I think the witness is having a difficult
4 time.

5 MR. CUNNINGHAM: Where in the information you
6 are currently providing to the Board in your numerical
7 analysis are numerical statements of escapement based upon
8 the reach evaluated by Department of Fish and Game, and
9 only by the Department of Fish and Game, below Rose Bar
10 Reach? Is there any place in these exhibits?

11 MR. MITCHELL: Those would represent the
12 numbers prior to 1990. Those estimates would include
13 those surveys that were done in those reaches.

14 MR. CUNNINGHAM: Right. But from 1990 on the
15 only numerical data I see reflects an expanded
16 geographical survey area; is that correct?

17 MR. MITCHELL: No. Exhibit D represents the
18 numbers for the entire reach, the entire area including
19 Rose Bar. And let me step back by saying, first of all,
20 that DFG's estimate prior to 1990 reflect their estimates
21 of the total number of salmon spawning below Highway 20
22 plus the 15 and a half percent they assumed spawned above
23 Highway 20.

24 In the next grouping, from 1991 through 2002, the
25 light colored bars represent that same -- that represent

1 basically that same methodology. Using the estimated
2 numbers below Highway 20 plus the 15 and a half percent
3 above Highway 20. The dark bars are the estimates that
4 would be that we developed based on actual surveys of the
5 Rose Bar Reach.

6 MR. CUNNINGHAM: I appreciate that, Mr.
7 Mitchell. My question to you was: Your Exhibit C is a
8 numerical enumeration of data compiled or displayed in
9 Exhibit D. At least that is what it purports to be. It
10 states the annual fall-run chinook salmon spawning
11 escapement in the Yuba River. That is what it is
12 identified as at the very top.

13 But when I look at the numbers from 1990 through
14 2002, those numbers reflect the dark bars that are on
15 Exhibit D; isn't that correct?

16 MR. MITCHELL: They do for 1994 and '96
17 through 2002.

18 MR. CUNNINGHAM: So the new data you provided,
19 at least numerically in 2001 where it says 22,384
20 estimated post reservoir escapement, is based upon your
21 actual estimate rather than a comparable number using the
22 Department of Fish and Game's estimated process; is that
23 correct?

24 MR. MITCHELL: That is true for Exhibit C, but
25 not for Exhibit D.

1 MR. CUNNINGHAM: I appreciate that. But
2 arguments have been made already on your behalf that
3 Exhibit C reflects a return of 22,384 fish in 2001 and a
4 return of 23,202 fish estimated in 2002.

5 And those are presented in a numerical column which
6 begs for comparison of prior years.

7 MR. LILLY: Mr. Baggett, I object again. We
8 are getting statements; we are not getting questions.

9 MR. CUNNINGHAM: I apologize, Mr. Baggett.

10 CHAIRMAN BAGGETT: They are compound. If you
11 break it down.

12 MR. CUNNINGHAM: Mr. Baggett, I will do my
13 best. I am unfortunately not getting responsive answers
14 to questions that I believe are clearly asked. I will
15 work on it, sir.

16 CHAIRMAN BAGGETT: Please.

17 MR. CUNNINGHAM: Mr. Mitchell -- let me ask.
18 This is the third time -- where, in any of the exhibits
19 attached to your declaration, are the numerical
20 coequivalents of the light columns on Exhibit D for the
21 years 1994 through 2002?

22 MR. MITCHELL: Those aren't presented. We did
23 not present those in Exhibit C.

24 MR. CUNNINGHAM: So when I look at Exhibit C,
25 I see nothing that indicates that the information for the

1 years 1994 through 2002 is in any way different than that
2 information presented in prior years. Is that an
3 oversight, Mr. Mitchell?

4 MR. MITCHELL: I would say it should have been
5 included in Table C as well as Exhibit C as well as
6 Exhibit D.

7 MR. CUNNINGHAM: Isn't it true that the
8 Department's estimating procedure or methodology was used
9 in each of those years, 1994 through 2002, the post
10 reservoir escapement estimate, estimated number would be
11 smaller than those numerical representations in Exhibit C?

12 MR. MITCHELL: Yes, I think you can see that
13 in Exhibit D.

14 MR. CUNNINGHAM: Thank you.

15 Mr. Mitchell, was any attempt made to do a
16 statistical analysis of a trend in data collected from the
17 years 2001 and 2002?

18 MR. MITCHELL: No.

19 MR. CUNNINGHAM: Mr. Bratovich, have you ever
20 personally operated a rotary screw trap?

21 MR. BRATOVICH: No, I have not.

22 MR. CUNNINGHAM: When you discussed the
23 operation of a rotary screw trap on the Yuba River during
24 the years 2000, 2001 and 2002, were you physically
25 involved in the operation of those traps or that trap?

1 MR. BRATOVICH: No, sir, I was not.

2 MR. CUNNINGHAM: Who operated that trap during
3 that time period?

4 MR. BRATOVICH: My understanding is the
5 California Department of Fish and Game operated the trap
6 for two seasons and part of the last season where the Yuba
7 County Water Agency contracted with Jones & Stokes to
8 operate the trap.

9 MR. CUNNINGHAM: Mr. Bratovich, to your
10 knowledge, has the -- do you -- to your knowledge has the
11 rotary screw trap used on the Yuba River ever been
12 calibrated using a mark and release process to assure that
13 it can identify fish that it captures?

14 MR. BRATOVICH: A trap doesn't identify fish.
15 Rephrase your question.

16 MR. CUNNINGHAM: To the extent you've
17 indicated that the trap collects fish, has it been
18 calibrated to assure that it collects accurately the fish
19 count coming down through the water column?

20 MR. BRATOVICH: A series of mark/capture
21 experiments were conducted in the last half of the third
22 monitoring season for steelhead only, and as far as I am
23 aware those are the only mark/recapture capture efficiency
24 procedures that have been utilized for the RST.

25 MR. CUNNINGHAM: Mr. Bratovich, you testified

1 that you are familiar with the use of rotary screw trap
2 data. Normally when you place any reliance on such trap
3 data do you look to assure that it has been calibrated for
4 the information you are seeking to collect?

5 MR. BRATOVICH: What is interesting is that
6 this has only been utilized for the three years, and the
7 Department of Fish and Game did not conduct any capture
8 efficiency experimentation. It was only until the last
9 test of the last season was done. Capture efficiency
10 tests since the last half of the last season have been
11 conducted, and I am very hopeful that additional capture
12 efficiency tests are conducted in the future in order to
13 more clearly estimate capture efficiency for both juvenile
14 chinook and steelhead.

15 MR. CUNNINGHAM: But you're here today
16 testifying today, deriving conclusions today on this data.
17 To your knowledge, has this been calibrated to assure that
18 it captures all juvenile outmigrating salmonids,
19 especially outmigrant chinook salmon?

20 MR. BRATOVICH: No trap is going to capture
21 all outmigrant fish. That is why it is called a sampling
22 device. It samples the total number of fish that are
23 going past a certain point. So I would have to say, no,
24 it is not going to capture all the fish at that point, but
25 the question is have sufficient number of capture

1 efficiency experimentations been conducted in order to
2 more accurately refine total abundance estimates. Then I
3 would say that it has only been conducted for steelhead
4 for the last half of the last season.

5 MR. CUNNINGHAM: Mr. Bratovich, has this trap
6 been calibrated to assure that it captures various age or
7 size groups within your larger universe of juvenile
8 salmonids?

9 MR. BRATOVICH: As I responded to Mr. Hutchins
10 in my cross-examination, it -- just again, initially
11 conducted mark/recapture capture efficiency experiments
12 for the last half of the season. If one were to conduct
13 enough mark/recapture capture efficiency estimations over
14 a series of various conditions, and to be responsive to
15 your question, over a series of different sizes of
16 individual fish, then one could better answer that
17 question and come up with site-specific, size-specific
18 capture of efficiencies. The data does not exist to do
19 that today.

20 MR. CUNNINGHAM: Let me break it out even a
21 little further, then.

22 Has this trap been calibrated to determine whether
23 or not it accurately captures a sampling of chinook
24 salmon, juveniles, larger than 60 millimeters, for
25 example?

1 MR. BRATOVICH: No capture efficiency
2 experimentation for juvenile salmon of any size has been
3 conducted to date on the Lower Yuba River using RST.

4 MR. CUNNINGHAM: Isn't there a problem in
5 using a rotary screw trap when you use it to sample larger
6 and larger fish, more mature fish?

7 MR. BRATOVICH: As I explained to
8 Mr. Hutchins, until such time as size-specific capture
9 efficiencies are determined, I would not necessarily agree
10 there is a problem, per se. I think there is possibly
11 varying capture efficiencies, if that is what you mean.

12 MR. CUNNINGHAM: Are you aware of an event or a
13 concept called trap avoidance, Mr. Bratovich?

14 MR. BRATOVICH: Yes. I am aware of the term.

15 MR. CUNNINGHAM: Is it safe to say the trap
16 avoidance occurs when a fish that would be potentially
17 sampled within the trap is large enough or agile enough to
18 escape the trap?

19 MR. BRATOVICH: It is one component of capture
20 efficiency interpretation. Essentially capture efficiency
21 estimates the probabilities of two components. One
22 probability that an individual encounters your sampling
23 device, and, two, that an individual actually be captured
24 once the device is encountered.

25 MR. CUNNINGHAM: I believe you earlier

1 testified that no such mark and release information has
2 been developed for this rotary screw trap?

3 MR. BRATOVICH: That is not correct. I
4 testified now several times in response to several
5 questions to capture efficiency experimentation has been
6 done for the last half of the last season for steelhead
7 juveniles only, not for juvenile chinook.

8 MR. CUNNINGHAM: So, Mr. Bratovich, when you
9 testified that your information and your rotary screw trap
10 data establishes a temporal distribution of juvenile
11 chinook salmon abundance, you don't know whether it
12 actually reflects large juvenile salmon abundance, do you?

13 MR. BRATOVICH: Again, I think it is uncertain
14 as to what capture efficiency for any size individuals
15 are.

16 MR. CUNNINGHAM: Mr. Bratovich, I am sorry,
17 let's -- you have made a very specific statement. I am
18 reading Page 6, Line 18 of your declaration. The
19 cumulative temporal distribution of juveniles chinook
20 salmon abundance is the lead in phrase for that sentence.
21 At the bottom of that same paragraph, Paragraph 6, you
22 say:

23 In reality almost all juvenile chinook
24 salmon downstream movement occurs before
25 April 21st. (Reading)

1 Is it not true that that rotary screw trap may or
2 may not accurately sample and discern large juvenile
3 chinook salmon that are capable of avoiding that trap?

4 MR. BRATOVICH: There is a possibility various
5 capture efficiency for size of individuals, yes.

6 MR. CUNNINGHAM: Until you know this
7 efficiency, how can you make any conclusion that almost
8 all juvenile chinook salmon downstream movement occurs
9 before April 21st? You don't know what is happening to a
10 certain size class, do you?

11 MR. BRATOVICH: RSTs are a commonly employed
12 sampling device for fishery investigations. There are
13 investigation as conducted in California and elsewhere
14 that utilize RSTs and do not have size-specific,
15 site-specific, multi-seasonal, multi-variable capture
16 efficiency experimentation.

17 So I guess in summary I would say the best available
18 information which was not available during the 2000
19 hearing or incorporated into the D-1644 decision is the
20 RST data, and it exists as it exists today. But to
21 elucidate, again, RSTs are utilized without capture
22 efficiency information elsewhere.

23 MR. CUNNINGHAM: Mr. Bratovich, I am a strong
24 component of RSTs. I believe the Department of Fish and
25 Game is. But there are also limitations in the use of

1 RSTs; is that not true?

2 MR. BRATOVICH: There is limitations in
3 utilizing any sampling device, particularly difficult when
4 you can't see the thing you are trying to measure, it is
5 actually in the water swimming. RSTs probably are a more
6 efficient and effective sampling device than many others
7 that could be used. Certainly for one reason they operate
8 on essentially a continuous basis.

9 It would improve our estimation capabilities to have
10 a multi-year, multi-condition series of capture efficiency
11 estimations; that is true.

12 MR. CUNNINGHAM: Mr. Bratovich, let me try
13 this question one more time. Again, I do apologize to the
14 Board Members, but I seem to be struggling with this
15 question and answer.

16 Mr. Bratovich, when you conclude that almost all
17 juvenile chinook salmon downstream movement occurs before
18 April 21st, and you base it upon data collected only at
19 the Hallwood RST, you do not know whether that trap has
20 accurately sampled a certain size class of fish or not;
21 isn't that true?

22 MR. BRATOVICH: What I can do is evaluate --

23 MR. CUNNINGHAM: Can I get a yes or no answer?

24 CHAIRMAN BAGGETT: Yes or no question.

25 MR. BRATOVICH: There is not a yes or no

1 answer to that question.

2 CHAIRMAN BAGGETT: You can't answer the
3 question?

4 MR. BRATOVICH: I can't answer it yes or no.
5 I tried to answer it several times already.

6 MR. CUNNINGHAM: I will try something else.
7 Mr. Baggett, I apologize for the time I am taking. I do
8 ask leave of this Board. I think this is relevant and
9 important. This testimony is going to the heart of
10 Mr. Bratovich's declarations.

11 CHAIRMAN BAGGETT: You can have a few
12 additional minutes. I gave other counsel the same
13 opportunity. Five minutes.

14 MR. CUNNINGHAM: Mr. Bratovich, in the data
15 you collected through the rotary screw trap did you
16 collect any adult or subadult steelhead trout?

17 MR. BRATOVICH: I would like to clarify. I
18 personally didn't collect the data. But the data records
19 indicate any large steelhead trout collected, yes.

20 MR. CUNNINGHAM: I believe your data indicates
21 to the extent steelhead trout were found in these traps
22 they were found in the traps, I believe, in the months of
23 July and August; is that correct?

24 MR. BRATOVICH: Of a specific size or in
25 general?

1 MR. CUNNINGHAM: Just in general.

2 MR. BRATOVICH: In general, juvenile steelhead
3 were collected over a series of months, not just July and
4 August. The majority of the steelhead collected were
5 collected after June 30; that is correct.

6 MR. CUNNINGHAM: Where are those -- to your
7 knowledge, where are those juvenile steelhead before June
8 30th and after April 21st?

9 MR. BRATOVICH: It makes sense that those
10 individuals would be coming from upstream locations in the
11 Yuba River.

12 MR. CUNNINGHAM: To your knowledge, would
13 flows during the period April 21st through July 1st be
14 important for the transport or survival of those juvenile
15 steelhead?

16 MR. LILLY: Objection. Question is vague when
17 he says flow, as to what level of flow he is talking
18 about.

19 MR. CUNNINGHAM: Any flows. Are these fish
20 actually living in the Yuba River at that period in time,
21 Mr. Bratovich?

22 MR. BRATOVICH: I think it makes common sense
23 to indicate that the fish captured at the RST had resided
24 previously to being captured in upstream locations in the
25 Yuba River.

1 MR. CUNNINGHAM: Where is the RST located?

2 MR. BRATOVICH: Near Hallwood Boulevard.

3 MR. CUNNINGHAM: Hallwood Boulevard is about
4 six miles above the mouth of the river?

5 MR. BRATOVICH: I think it is closer to seven.

6 MR. CUNNINGHAM: What happens after the fish
7 will pass Hallwood and the RST at Hallwood? When I say
8 fish, juvenile salmonids, chinook?

9 MR. BRATOVICH: That is really not known at
10 this time.

11 MR. CUNNINGHAM: So do we know do they depart
12 the system quickly, shortly, long-term? Do we have any
13 information about how they get from Hallwood down and into
14 the Feather River from the data you have collected?

15 MR. BRATOVICH: No. I would say it is
16 uncertain as to the rate of movement or even actually it
17 is uncertain as to where those fish go. I don't have any
18 quantitative information to indicate their location to
19 indicate their favorite location at that time, no.

20 MR. CUNNINGHAM: Do you have any understanding
21 of whether the Yuba River changes in nature between the
22 area above Hallwood and the area below Hallwood? When I
23 say change, change in nature, change in flow, flow
24 velocity, riverine structure, riparian structure.

25 MR. BRATOVICH: I have some knowledge. I have

1 some understanding, yes.

2 MR. CUNNINGHAM: Is there a change
3 approximately at the Hallwood location between the upper
4 river and the lower river on Yuba River?

5 MR. BRATOVICH: The upper river and the lower
6 river?

7 MR. CUNNINGHAM: I should say the area between
8 the Daguerre Dam and Hallwood and the area of Hallwood
9 down to the mouth.

10 MR. BRATOVICH: Is my understanding that there
11 is generally a broader floodplain, perhaps lower velocity
12 flows after Hallwood Boulevard.

13 MR. CUNNINGHAM: Do you have any knowledge
14 yourself personally when juvenile chinook salmon depart
15 the actual waters of the Yuba River and enter into the
16 Feather River?

17 MR. BRATOVICH: There is information -- only
18 available information really of any quantitative nature is
19 this Hallwood RST. That is, granted, located seven miles
20 upstream, so, no. Downstream from that point, no.

21 MR. CUNNINGHAM: Again, in Paragraph 6 of your
22 declaration when you say almost all juvenile chinook
23 salmon downstream movement occurs before April 21st, the
24 most you can conclude from your information is that at
25 least the movement to the Hallwood screen, but you have

1 nothing to say what happens past the Hallwood screen going
2 downstream?

3 MR. BRATOVICH: As restricted to this data
4 analysis, that's correct, or a Hallwood RST.

5 MR. CUNNINGHAM: I apologize, the Hallwood RST
6 which is located approximately at Hallwood Boulevard area.

7 Mr. Baggett, if I might have a minute, I think I am
8 done.

9 CHAIRMAN BAGGETT: Yes.

10 MR. CUNNINGHAM: I would like to thank all of
11 you gentlemen, Mr. Mitchell, Mr. Bratovich and Mr. Aikens,
12 Mr. Lilly, for your patience.

13 Thank you, Chairman Baggett. I do appreciate your
14 time, and that is all we have for cross-examining.

15 Thank you.

16 CHAIRMAN BAGGETT: Thank you.

17 Department of the Interior.

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19 CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

20 BY DEPARTMENT OF THE INTERIOR

21 BY MR. BRANDT

22 MR. BRANDT: Mr. Aikens, I have just a couple
23 questions for you.

24 You mentioned that you're about to start a process
25 of negotiating a contract with Wheatland; is that right?

1 MR. AIKENS: A water sales agreement; that's
2 correct.

3 MR. BRANDT: Have you done water availability
4 study in preparation for negotiating that contract?

5 MR. AIKENS: In general, we have done a lot of
6 water availability studies associated with the State Board
7 hearing process.

8 MR. BRANDT: What about in preparing for how
9 much water would be available for Wheatland?

10 MR. AIKENS: Those studies directly reflect on
11 what water would be available and could be used for that
12 purpose.

13 MR. BRANDT: When you say the State Board, are
14 you talking about the 1644 process?

15 MR. AIKENS: That's correct.

16 MR. BRANDT: There is a draft agreement
17 already out?

18 MR. AIKENS: That's correct.

19 MR. BRANDT: Is there a shortage provision in
20 that draft agreement?

21 MR. AIKENS: Yes, there is.

22 MR. BRANDT: Does that shortage provision
23 reflect anything about the outcome of the D-1644 process
24 or relate in any way to the 1644 process?

25 MR. AIKENS: It reflects the outcome of any

1 regulatory process that may have an affect on the Water
2 Agency's ability to deliver water.

3 MR. BRANDT: You haven't provided an out if
4 D-1644 or something similar is continued, you haven't
5 provided an out in that shortage contract?

6 MR. LILLY: I object. It is unclear what you
7 mean by an out. I request the question be rephrased.

8 CHAIRMAN BAGGETT: Please restate.

9 MR. BRANDT: Yes.

10 Have you provided an escape from liability for
11 reduced deliveries based on lack of availability of water
12 arising out of an order like D-1644?

13 MR. AIKENS: Are you talking liability for the
14 Water Agency? For Wheatland?

15 MR. BRANDT: Liability for Yuba County Water
16 Agency for not delivering the full amount.

17 MR. AIKENS: The water sales contract allows
18 us to meet in all applicable state and federal and
19 regulatory requirements. We will meet those and then we
20 will go through our diversions to our customers inside
21 Yuba County.

22 MR. BRANDT: Mr. Mitchell, in Staff Exhibit 4,
23 which is your declaration and attachments, I notice in
24 your declaration it describes the tables and attaches them
25 and says how they are prepared.

1 Can you please restate your ultimate conclusion that
2 I don't see in your declaration about what the Board
3 should learn from your data that you presented?

4 MR. MITCHELL: Well, the conclusions that we
5 presented in the past do apply and they are in the record.
6 But the comparison that we are making here is between the
7 period prior to and after New Bullards Bar went on line.
8 And the evidence here is that following the construction
9 of New Bullards Bar there was really no change and there
10 may have been an increase which definitely is occurring in
11 recent years during the project period relative to the
12 preproject period. And, therefore, the conclusion was as
13 we stated earlier that the runs have been sustained and,
14 if not, have been increased with the operation of the
15 project during that period.

16 MR. BRANDT: Does your conclusion include any
17 causal connection between the operation of the project and
18 the health of the runs?

19 MR. MITCHELL: When you say "causal
20 connection," experimental studies to test hypotheses
21 regarding the mechanisms, is that --

22 MR. BRANDT: I want to understand your
23 conclusion, what you're testifying here today. Are you
24 testifying that there is a causal connection of the way
25 that Yuba project is operated has contributed to improved

1 health of the fishery?

2 MR. LILLY: I just want to ask for
3 clarification, whether we are talking about his testimony
4 today or his past testimony. I think there is a
5 difference there.

6 MR. BRANDT: I want --

7 CHAIRMAN BAGGETT: Sustained. Clarify which
8 testimony.

9 MR. BRANDT: I think that is actually a really
10 good question because I need to understand -- you said,
11 well, it is consistent with my past testimony. What are
12 you testifying today about that is consistent with your
13 past testimony? So I am hopefully trying to understand.
14 Are you testifying the same thing that is coming to that
15 ultimate conclusion? What are you testifying today as
16 your ultimate conclusion that we need to learn from the
17 data you present?

18 MR. MITCHELL: I did state that the runs have
19 remained at preproject levels, if not have increased, over
20 during the period when New Bullards Bar Reservoir was in
21 operation.

22 MR. BRANDT: And when you say "the runs," are
23 you talking about all runs of the chinook salmon?

24 MR. MITCHELL: I am saying chinook salmon in
25 the river and specifically fall-run, and as I stated

1 before these surveys focus on fall-run and have not -- we
2 have not been able to get definitive estimates on
3 spring-run.

4 MR. BRANDT: Does your conclusion in your
5 ultimate opinion include a conclusion for the same thing
6 about spring-run and steelhead?

7 MR. MITCHELL: I would have to go back to my
8 previous testimony back in 1992 which examined documents
9 from the Department of Fish and Game, various anglers that
10 reported increases in the fishery, primarily steelhead,
11 following the years after the New Bullards Bar project
12 went on-line. We have a number of examples, documents,
13 produced by biologists and anglers regarding improvement
14 in the fishery following the increase in releases in cold
15 water to the Yuba, Lower Yuba River, following the onset
16 of operations at New Bullards Bar.

17 We do not have quantitative estimates, however, for
18 steelhead and spring-run, long-term records like we do for
19 fall-run.

20 MR. BRANDT: The data you are presenting today
21 is just fall-run; is that correct?

22 MR. MITCHELL: I say yes. The fall-run. This
23 reflects primarily the fall-run. We do not know to what
24 extent this reflects spring-run. We have not been able to
25 distinguish fall-run and spring-run during the surveys.

1 MR. BRANDT: Has the fall-run been listed a
2 threatened or endangered species pursuant to the
3 Endangered Species Act?

4 MR. MITCHELL: I believe it has candidate
5 status, the Central Valley fall-run, late fall-run chinook
6 salmon.

7 MR. BRANDT: Spring-run, has that been listed
8 as threatened or endangered?

9 MR. MITCHELL: It is listed threatened under
10 the federal Endangered Species Act.

11 MR. BRANDT: We don't have any data for the
12 spring-run?

13 MR. MITCHELL: No quantitative data, that's
14 correct.

15 MR. BRANDT: If I heard you correctly, you're
16 basically saying because of the cold there is some causal
17 connection between the operation of the project and at
18 least maintaining stability of all runs?

19 MR. MITCHELL: I think that with the evidence
20 we have we can support at least, I'll say in our
21 professional judgment, that the water temperatures
22 following the operation of New Bullards Bar Reservoir,
23 water temperatures and flows have been conducive to both
24 -- all salmonid runs, because conditions are now much
25 better down there than they were prior to the project,

1 particularly in the summer and fall which are periods
2 where steelhead and spring-run are particularly sensitive
3 to.

4 MR. BRANDT: We don't have any data for the
5 spring-run?

6 MR. MITCHELL: That's correct.

7 MR. BRANDT: Isn't it true that spring-run and
8 steelhead are going to need different flow patterns than
9 fall-run which is the data you present?

10 MR. LILLY: I am going to object. The
11 question is unclear as to what time of year he's talking
12 about.

13 MR. BRANDT: Over a year period isn't it true
14 that the spring-run and steelhead are going to need a
15 different flow pattern over an entire year than the
16 fall-run for which you presented data here today?

17 MR. LILLY: Now I am going to object that I
18 think he is mischaracterizing the testimony. These data,
19 I think Mr. Mitchell has very clearly said, are all adult
20 chinook salmon. They are not just fall-run. When he says
21 these are just fall-run, he is misstating the prior
22 testimony.

23 MR. BRANDT: I think he just --

24 CHAIRMAN BAGGETT: Clarify.

25 MR. BRANDT: -- he just testified the data are

1 based on fall-run, is what he just testified to.

2 CHAIRMAN BAGGETT: As I recollect.

3 MR. BRANDT: So my question remains: Don't
4 spring-run and steelhead need different flow patterns in
5 the river than fall-run, which are the data you presented
6 here today?

7 MR. LILLY: I still say same objection.

8 CHAIRMAN BAGGETT: Answer. Overruled.

9 MR. MITCHELL: I have to think about this. I
10 think to answer that question would require the kind of
11 analyses that would examine seasonal requirements. I
12 think there are -- there may be times of the year when
13 certain flows are suitable for or provide or meet the
14 requirements of all species. I think what I can say is
15 that because fall-run do not depend on the river during
16 the summer, for example, to the extent that spring-run and
17 steelhead do, that there would be different requirements
18 simply because fall-run aren't in the river.

19 So this is a complicated question and would require
20 going through each of the seasons to look at the relative
21 importance of meeting those environmental conditions for
22 each species.

23 MR. BRANDT: Your testimony here today does
24 not make any conclusions as to the spring-run needs and
25 the contribution of the project to their health?

1 MR. MITCHELL: No, it doesn't address
2 spring-run.

3 MR. BRANDT: In looking at your Exhibits A, B,
4 C, D, is it your conclusion that there has been an
5 increase or just a stable fish population for the data
6 that you presented in your exhibits attached to your
7 declaration?

8 MR. MITCHELL: My conclusion from the data is
9 that the runs have, on average, have remained stable. The
10 fall-run chinook salmon run has remained stable during the
11 period 1953 through 2002 with some increases in the last
12 several years creating another increase.

13 MR. BRANDT: Let's look at Exhibit D to your
14 declaration. The wet -- the years in the late 1990s, what
15 kind of hydrologic years were those?

16 MR. MITCHELL: The late '90s?

17 MR. BRANDT: Yes.

18 MR. MITCHELL: There were -- I am not sure on
19 how many. There were three wet years. I just don't
20 recall which years. And either below normal or above
21 normal year.

22 MR. BRANDT: Weren't '95 through '99, so up to
23 2002, weren't those all above average or wet years?

24 MR. MITCHELL: I believe so. I believe so.

25 MR. BRANDT: Did your conclusion that this

1 remain stable take into consideration or control for the
2 factor of wetter years in the late 1990s?

3 MR. MITCHELL: No. We were looking strictly
4 at the average run size during that period.

5 MR. BRANDT: You didn't control for what the
6 -- whether there was increase flows in the river for flood
7 control releases or anything like that?

8 MR. MITCHELL: Well, the control was that we
9 had a very large number of years since 1972, for example,
10 representing a whole wide variety of water year types, as
11 was true from the preproject years and, therefore, the
12 control is that those water -- that variability is
13 represented in that long record.

14 MR. BRANDT: But isn't it true when you look
15 at this graph most of the high numbers are all happening
16 during the late 1990 period? If you look from 1972 to
17 2002, you have one apparently in 1982.

18 MR. MITCHELL: I really can't answer that
19 without looking at the relationship between flows and run
20 size. We did provide testimony regarding the relationship
21 between flows in the Yuba River and run size three years
22 later and found no relationship.

23 MR. BRANDT: Your testimony here today does
24 not testify about what the flow levels are, what the
25 affect are on the runs; is that correct?

1 MR. MITCHELL: That's correct.

2 MR. BRANDT: Did your analysis, reflected in
3 Exhibit D, consider the affect of demands on the river or
4 deliveries from Yuba County to its customers?

5 MR. MITCHELL: No.

6 MR. BRANDT: Did your analysis here consider
7 any further conclusion that there is stability over time,
8 did it consider changes in ocean conditions or ocean
9 harvest?

10 MR. MITCHELL: We presented testimony
11 regarding ocean harvest and its affect, potential affect,
12 on run size at earlier hearings, yes.

13 MR. BRANDT: But you haven't testified at this
14 point at any time about -- let me finish my question.

15 You haven't testified at this point about changes in
16 ocean harvest policies in the last three or four or five
17 years; is that correct?

18 MR. MITCHELL: That's correct.

19 MR. BRANDT: The one thing I notice in looking
20 at Exhibit D, it appears that bars that you call actual
21 count are all higher than the estimated count. Is that an
22 accurate description?

23 MR. MITCHELL: Yes, that is true.

24 MR. BRANDT: Does that suggest that when you
25 actually counted it came up with more fish than when you

1 estimate it?

2 MR. MITCHELL: I think it reflects the fact
3 that the estimated number is in this case in all of these
4 years higher than 15 and a half percent, and that is all
5 we can say.

6 MR. BRANDT: Shouldn't we draw from these
7 differences, just discussed, shouldn't we draw the
8 conclusions that the earlier numbers that were all
9 estimated perhaps should be higher than what they are
10 because they were based on estimates and not, as you call
11 it, actual counts?

12 MR. MITCHELL: I asked myself that question,
13 too. I think that is a good question. It bears on the 15
14 and a half percent, whether that is truly reflective in
15 the long-term. I really can't say without an actual
16 calibration, so to speak, in those previous years to
17 actually evaluate whether 15 and a half percent was higher
18 or lower in previous years. You can't really make that
19 judgment based on that fact.

20 MR. BRANDT: Mr. Bratovich, would you please
21 state what your ultimate opinion is based on the data you
22 presented here that you're testifying today on.

23 MR. BRATOVICH: My conclusionary opinion of
24 today's testimony is that the data collected since
25 issuance of D-1644, specifically the RST data, do not

1 support statements in D-1644 on Page 61 and 62 which serve
2 as an underlying premises for establishment of the flows
3 from the April 21 through June 30 period. Specifically on
4 Page 61, Paragraph 2, first sentence. I will repeat it
5 one more time. The primary fishery consideration in the
6 April through June period has provided adequate flows for
7 juvenile chinook salmon and steelhead emigration supported
8 by the statement on Page 62, the third full, second
9 sentence, which states, however, the record indicates that
10 emigration of juvenile chinook salmon from the Lower Yuba
11 River begins in late April, peaks in May and is normally
12 complete by the second week in June.

13 MR. BRANDT: In earlier cross-examination I
14 believe you used the word that, "the vast majority of
15 fish" migrate before April 21st.

16 Did I get that right?

17 MR. BRATOVICH: That quote I was specifically
18 referring to the RST capture of juvenile chinook salmon at
19 the Hallwood RST, and the data again indicates 98 and 99
20 percent of the abundance indices were captured by that
21 date for each of the three years assessment.

22 MR. BRANDT: Are you making a conclusion based
23 on all runs of juvenile chinook salmon?

24 MR. BRATOVICH: There is no ability to
25 distinguish between the spring-run and fall-run juvenile

1 chinook in the data that has been collected at the RST.
2 So I am treating them as a whole.

3 MR. BRANDT: It is all based on the RST?

4 MR. BRATOVICH: Yes, sir.

5 MR. BRANDT: The abundance index that you
6 referred to, does that reflect the higher flow of the
7 river?

8 MR. BRATOVICH: The RST -- please bear with me
9 for a moment. The abundance index reflects the count of
10 fish captured on a daily basis in the trap multiplied by
11 the version of the proportion of the total river flow
12 sample. Again, in other words, the RST only samples a
13 portion of the river, but it is the expansion of that
14 count by the proportion of total river flow sampled is the
15 abundance index estimate.

16 MR. BRANDT: Where is the RST located in the
17 river?

18 MR. BRATOVICH: Near Hallwood Boulevard.

19 MR. BRANDT: But within the river itself at
20 Hallwood Boulevard where is it located?

21 MR. BRATOVICH: It is located in a fast
22 flowing portion of the channel below a ripple.

23 MR. BRANDT: Is that in the center, near the
24 side?

25 MR. BRATOVICH: Bill will have to help me out

1 here, but it is a little towards the north side, perhaps.

2 MR. BRANDT: In order to get to that abundance
3 index is your assumption, then, that you take whatever
4 gets into the RST and you multiply it by the rest of the
5 flow, and it is just proportional, it is proportional, the
6 same proportion there would be in the rest of the flow.
7 Is that a correct assumption?

8 MR. BRATOVICH: That is a basic assumption.
9 To be more specific about that assumption, it is a basic
10 assumption, and the assumption is that there is a uniform
11 cross-sectional distribution of juveniles passing that
12 location. And, therefore, in turn the assumption is that
13 there is a direct one-to-one relationship between
14 proportion of river flow sampled and proportion of the
15 number of individuals passing that location sample.

16 MR. BRANDT: How did you base the assumption
17 that amount of fish going through this one section is the
18 same proportionally as every other part regardless of the
19 flow rates or the depth of the river and throughout the
20 water column?

21 MR. BRATOVICH: There is no specific data to
22 validate that assumption on the Lower Yuba River. As I
23 did indicate previously, however, without site-specific
24 capture efficiency information it appears to be a
25 reasonable procedure and has been used elsewhere.

1 MR. BRANDT: You don't have any data to back
2 up that assumption that it is the same for that where the
3 RST as it is for the rest of the river?

4 MR. BRATOVICH: No, sir.

5 MR. BRANDT: That assumption is required to
6 get to the abundance index. It is required to have
7 confidence in the index you have to make that assumption
8 and have confidence in that assumption; is that right?

9 MR. BRATOVICH: The abundance index is based
10 on that assumption; that is correct. Again, I would like
11 to elaborate slightly on that.

12 There is three ways to calculate abundances to use
13 this data. Again, multi-year, multi-condition efficiency
14 experimentation using marker capture is probably the best
15 way. The way this proportional volume sample
16 extrapolation is another way. One can simply rely on the
17 counts. So there is potential bias associated with that
18 assumption of uniform distribution. There is potential
19 bias associated with the simple counts, too, because they
20 may not be distributed in any known fashion as what
21 actually enters the trap as well.

22 The bottom line here is that we can look at two ways
23 now. We can't look at it in capture efficiency
24 experimentation because the data doesn't exist yet,
25 although there is a very good start on collecting that

1 data. But whether you look at the abundance index or just
2 the count, it doesn't change any of the conclusions. In
3 fact, looking at simply the count, it is very similar to
4 the abundance index estimation. The only differences are
5 for juvenile chinook salmon instead of 98, 99 and 98
6 percent passing by April 21, if you use the counts only in
7 the cumulative count, it would be 99, 99 and 98 percent.
8 And a very similar situation for the steelhead. Very
9 close association between just using the counts or using
10 the abundance index.

11 MR. BRANDT: You'er using the abundance index
12 to do all chinook salmon regardless whether they are
13 spring-run or fall-run, you can't determine the life cycle
14 or the period that spring-run or fall-run would be going
15 through?

16 MR. BRATOVICH: The data that has been
17 collected, there is no way to differentiate between
18 fall-run juveniles and spring-run juveniles that I am
19 aware of, certainly not indicated in the data sheets.

20 MR. BRANDT: Did you just say mark/recapture
21 process is the best way I think you called it?

22 MR. BRATOVICH: I did. It has the most
23 promise to actually address these issues of either
24 time-specific or size-specific or an influence of various
25 variables on capture efficiency.

1 MR. BRANDT: Was the RST calibrated by the
2 mark/recapture process?

3 MR. BRATOVICH: As I said earlier, calibration
4 really isn't a totally correct term, but have sufficient
5 number of capture efficiency experimentation has been done
6 in order to adjust your estimates, not relying upon the
7 uniform distribution Yuba process. The answer is no.

8 MR. BRANDT: Do different sizes of chinook
9 salmon get captured in the RST in the same proportion?

10 MR. BRATOVICH: I tried to respond to
11 Mr. Cunningham on that very question. Again, I can't
12 quantitatively or reliably answer that without the conduct
13 of size-specific mark/recapture capture efficiency
14 experimentation.

15 MR. BRANDT: Isn't it true that the larger
16 fish have -- I think you testified to this -- the larger
17 the chinook salmon is the more likely they will be able to
18 avoid the RST?

19 MR. BRATOVICH: That is probably -- it is
20 particularly true probably for steelhead because they can
21 outmigrate at a younger year, one-year-old or
22 two-year-old. So it can be a very wide size distinction
23 in steelhead. But this is probably true for chinook. As I
24 said, I think that it is intuitively logical to assume
25 that a larger fish has a greater swimming capability and,

1 therefore, potentially greater ability to avoid danger
2 represented either by an RST, a canal or predator.

3 MR. BRANDT: Aren't the larger fish the --
4 aren't the ones that are going down by the Hallwood RST,
5 aren't those the ones who have remained in the river
6 longer, aren't those the ones that -- let's start again.

7 Isn't it true that the larger fish are the ones that
8 remained in the river longer to be able to grow and
9 develop?

10 MR. BRATOVICH: It seems to be intuitively
11 true.

12 MR. BRANDT: So wouldn't they be the ones that
13 would be -- I think you said they are the ones that can
14 perhaps avoid the RST, more likely to avoid the RST.
15 Isn't it true that they're the ones that later on in the
16 year after April 21st, they would be going downstream?

17 MR. BRATOVICH: Again, I mentioned there is
18 some differential proportion of fish, using the general
19 rule of thumb 80 millimeter as smolt versus the smaller
20 juvenile, and if more of those were indeed collected
21 between April 21 and June 30 -- it is interesting to note
22 that some larger individuals and actually the largest
23 individuals were actually captured by the RST during the
24 months of December and March in the third season of
25 sampling. So those individuals may well have oversummered

1 and emigrated out the following fall.

2 MR. BRANDT: You don't have any data to say
3 when the larger fish would migrate?

4 MR. BRATOVICH: Just have the RST data.

5 MR. BRANDT: You said a few moments ago that
6 the RST are less likely to collect the larger fish, that
7 they are --

8 MR. BRATOVICH: I couldn't give you a
9 quantitative or responsible answer. I said it was
10 intuitive to assume that larger fish has greater avoidance
11 capabilities. Whether that is true at the RST or to what
12 extent that is true at the RST is undetermined at this
13 time.

14 MR. BRANDT: Are you aware of any studies or
15 any review that any California agency has done in looking
16 at the effectiveness of an RST collecting larger chinook
17 salmon?

18 MR. BRATOVICH: I am aware of some RST studies
19 that have been conducted by the California Department of
20 Fish and Game both on the American River and the
21 Sacramento River at Knights Landing. And capture
22 efficiency experimentation has been done, at least to my
23 personal knowledge, on the American River.

24 I am aware of statements in reports about capturing
25 yearling size steelhead on the Sacramento River at Knights

1 Landing trap, but I don't recall seeing any quantification
2 of capture efficiency by size-specific capture efficiency.

3 MR. BRANDT: Are you aware of any Fish and
4 Wildlife Service studies or examination of that issue?

5 MR. BRATOVICH: No, I am not.

6 MR. BRANDT: So the abundance index is based
7 only on the RST, right?

8 MR. BRATOVICH: Yes, sir.

9 MR. BRANDT: And I think what you said,
10 answered to me in earlier cross, that we are not certain
11 of the, used the word, "capture efficiency, not certain
12 that it is capturing all sizes of salmon, right?

13 MR. BRATOVICH: Well, we are certain of what
14 the data tells us. It is telling us -- it is telling us
15 that we are capturing a very broad range in size of fish.
16 We are not certain in quantitative terms with what
17 efficiency any individual size fish is captured by the
18 RST.

19 MR. BRANDT: We don't know -- we are not
20 certain of what is being collected at the RST is
21 consistent with the entire water column throughout that
22 river at that point?

23 MR. BRATOVICH: At this time without the
24 conduct of size-specific, site-specific capture
25 efficiencies, there is no way to have certainty within

1 that regard, I don't believe.

2 MR. BRANDT: We have to make an assumption
3 about uniform distribution?

4 MR. BRATOVICH: Either to an assumption about
5 uniform distribution or rely upon the counts themselves.

6 MR. BRANDT: We do know what mark/capture is,
7 but I think you used the word "best way" to develop these
8 kinds of conclusions?

9 MR. BRATOVICH: I think it is the best
10 approach to explore these issues. I'm not going to pass a
11 judgment of hypothetical results because I am aware of
12 results of mark/recapture capture efficiency
13 experimentation that have not yielded definitive answers
14 to that question as well.

15 MR. BRANDT: You rely only on the RST method
16 which is not the best way, correct?

17 MR. BRATOVICH: My testimony today and my
18 declaration refers to the RST sampling conducted by
19 Department of Fish and Game and Yuba County Water Agency
20 on the Lower Yuba River.

21 CHAIRMAN BAGGETT: Your time expired.

22 MR. BRANDT: I am done as well.

23 Thank you.

24 CHAIRMAN BAGGETT: Western Water have any?

25 Let's take a break. Recess.

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(Break taken.)

CHAIRMAN BAGGETT: Back on the record.

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CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

BY WESTERN WATER COMPANY

BY MR. MORRIS

MR. MORRIS: Good afternoon, gentlemen. I am Scott Morris, Kronick, Moskovitz, Tiedemann & Girard, representing Western Water Company. I would like to ask a few questions of each of you. I'll start with Curt Aikens. I want to talk a little bit about Wheatland Water District for a moment.

Going back to the history of the project. Could you tell us about the Wheatland water rights and what happened to those and whether they became part of the Yuba Project?

MR. AIKENS: The Wheatland Water District preceded the Yuba County Water Agency. They were interested in developing a project to bring surface water to the Wheatland area. The concept of the Yuba County Water Agency came along for purposes of not only supplying surface water to the farmers but also for flood control because of the flood issues in Yuba County.

With the formation of the water agency Wheatland Water District, as I understand it, gave up its water right applications to the Yuba County Water Agency in

1 exchange for commitment to bring a surface water system to
2 Wheatland Water District. That system was actually
3 designed with the original project. There was not enough
4 money to build that, thus it has been a long-term
5 commitment to get water down to that area. And that is a
6 short summary of what's happened.

7 MR. MORRIS: As far as you know, the Wheatland
8 Water District applied for, that is stored behind New
9 Bullards Bar Reservoir, as far as you know?

10 MR. AIKENS: As far as I know, yes.

11 MR. MORRIS: There was a question earlier
12 about the cost that was spent by certain individual
13 landowners within either Wheatland and/or Dry Creek. Is
14 that unusual for individual landowners to pay for the
15 ultimate connections?

16 MR. AIKENS: At least the way that Yuba County
17 Water Agency has worked with its member units, the water
18 districts, the specific connection to a distribution
19 system within a water district is the landowner's
20 responsibility. We helped the district in general with
21 the main canal and some of the distribution facilities.

22 MR. MORRIS: Thank you.

23 If Decision 1644 remains as it was originally issued
24 by the Board, will that impact the agency's ability to
25 meet Wheatland Water District's water supply in the

1 future?

2 MR. AIKENS: Are you referring to both the
3 interim and the long-term flows?

4 MR. MORRIS: Both. On Dry Creek and
5 Wheatland.

6 MR. AIKENS: The Water Agency was formed to
7 provide surface water to the irrigation districts. We
8 fully understand the responsibility of providing instream
9 flows. As the instream flow requirements show in terms of
10 interims and long-term flows the Wheatland Water District
11 coming on, there will be years of insufficient supply to
12 supply all the water needs of all the agencies' customers,
13 and that will be substantially aggravated with the
14 long-term flows.

15 MR. MORRIS: Thank you.

16 There was -- during the questioning of fishery
17 experts up here, there was a question about the operation
18 of New Bullards Bar towards the end of the 1990s. I don't
19 know if you remember that line of questioning, but I just
20 want to get this out on the table.

21 First, how would you determine what flows from New
22 Bullards Bar Reservoir, what operation criteria, real
23 briefly?

24 MR. AIKENS: In general we operate for flood
25 control operation. We operate, for instance, flow

1 requirements. We operate for power generation because of
2 the contract with PG&E, and we also operate for diversions
3 to our customers.

4 MR. MORRIS: Did the Water Agency operate New
5 Bullards Bar during the late 1990s in any way that would
6 manipulate the results of the fishery studies that were
7 conducted?

8 MR. AIKENS: Not that I am aware of. I would
9 say that one of the key differences is in the early 1990s,
10 and I don't recall the exact year, it may have been 1993,
11 the Department of Fish and Game did ask that Yuba County
12 Water Agency to only release water out of the low level
13 outlets of the two penstock outlets -- outlet out of the
14 dam into the penstock. And so that brought cold water
15 down during the entire spring season where in the past
16 during the initial part of the irrigation season warmer
17 water was taken from higher levels and in New Bullards Bar
18 Reservoir.

19 MR. MORRIS: But not in the late 1990s?

20 MR. AIKENS: No.

21 MR. BRIZARD: Mr. Mitchell, I would like to
22 switch over to you if I could.

23 We heard some discussion this afternoon on both of
24 your graphs. They have a 15.5 percent of spawning
25 estimate. Whose methodology is that to determine 15.5

1 percent estimate?

2 MR. MITCHELL: That was an assumption that was
3 made by the Department of Fish and Game for many years.

4 MR. MORRIS: That is not your assumption?

5 MR. MITCHELL: No.

6 MR. MORRIS: And what you've done is you've
7 actually taken fish counts from all over the area that you
8 can; is that correct?

9 MR. MITCHELL: Throughout the spawning area,
10 yes.

11 MR. MORRIS: Which methodology, in your
12 opinion, is more better or more reliable?

13 MR. MITCHELL: The actual surveys that
14 generate the estimates are better.

15 MR. MORRIS: I notice on your graphs that -- I
16 am going to refer to Exhibit D, for example. This
17 information where you have the little footnotes, Footnote
18 A and Footnote B, refer to the averages. Can you make any
19 conclusions based on either methodology on whether or not
20 there are more fish available pre or post New Bullards
21 Bar, either or both I guess?

22 MR. MITCHELL: Well, looking at the averages,
23 both methods lead to the conclusion that the averages are
24 higher during the post New Bullards Bar period compared to
25 the pre-New Bullards Bar period.

1 MR. MORRIS: There were some questions earlier
2 about spring-run salmon. Can you tell me why you don't
3 have spring-run salmon data?

4 MR. MITCHELL: Well, spring-run and fall-run
5 are impossible to distinguish during the surveys because
6 of overlapping spawning time. And so any carcasses that
7 we recovered during the survey if they are spring-run
8 would not be distinguishable as such.

9 MR. MORRIS: You just can't tell the
10 difference?

11 MR. MITCHELL: That's correct.

12 MR. MORRIS: It is technically impossible to
13 get that data at this time?

14 MR. MITCHELL: At this time.

15 MR. MORRIS: Thank you.

16 Mr. Bratovich, I want to talk a little bit about RST
17 traps that are out there. Did you work or did your team
18 work with the Department of Fish and Game in designing the
19 program that is used to sample out in Yuba River?

20 MR. BRATOVICH: Not specifically, no.

21 MR. MORRIS: Who placed those traps out there
22 in the first place?

23 MR. BRATOVICH: My understanding the
24 Department of Fish and Game, and then I believe Jones &
25 Stokes took over operation of those traps in June or so,

1 the last spawning season.

2 MR. MORRIS: Should I be asking Mr. Mitchell
3 these questions?

4 MR. BRATOVICH: Probably.

5 MR. MORRIS: Tell me which one is the right
6 one.

7 Did you relocate those traps since the original
8 installation?

9 MR. MITCHELL: The Hallwood trap has remained
10 essentially where it has been since the Department of Fish
11 and Game started those surveys.

12 MR. MORRIS: Is the RST technology, you might
13 call Fish and Game's preferred technology, as far as you
14 know, in measuring fisheries, in measuring the fish?

15 MR. MITCHELL: I really can't answer for them.
16 I think it is generally agreed that the RST is probably
17 the best capture device for measuring number of fish
18 migrating in the Central Valley.

19 MR. MORRIS: I think I will shift back to you
20 now, you tell me. Mr. Bratovich, whose idea was it to
21 conduct the trap efficiency tests on these RSTs?

22 MR. BRATOVICH: I guess it was the result of
23 cooperative and collaborative efforts between Yuba County
24 Water Agency, including Mr. Mitchell and myself, and the
25 Department of Fish and Game, National Marine Fisheries

1 Service, now referred to as NOAA Fisheries, and the Fish
2 and Wildlife Service, recognizing that this kind of
3 mark/recapture capture efficiency information would
4 provide us additional information to address these very
5 kinds of issues.

6 MR. MORRIS: As far as the proportional
7 assumption that we have been talking about where you take
8 fish arriving in the RST and you extrapolate that, if you
9 will, over the width of the river, is that the same
10 methodology that Fish and Game uses when they conducted
11 the estimates of fish during 1999 and 2001?

12 MR. BRATOVICH: I am not sure what methodology
13 was employed by them or anyone else at that time. What I
14 do know that it has been a common methodology procedure
15 and it has been used for RST information in British
16 Columbia as well as in the Central Valley. For example,
17 it is used now and has been used recently on the
18 Stanislaus River.

19 MR. MORRIS: Would it be fair to say that as a
20 standard method for estimating total numbers of fish?

21 MR. BRATOVICH: It is a common methodology.
22 Again, I have testified as to the potential advantages of
23 capture efficiency, but, again, it is a common
24 methodology.

25 MR. MORRIS: It is a common methodology, but

1 are you aware of any studies either on the Yuba, probably
2 not on the Yuba, but in other rivers where that
3 methodology has been used by Fish and Game or NOAA
4 Fisheries or U.S. Fish and Wildlife Service to support
5 their fisheries data?

6 MR. BRATOVICH: I am not directly aware of
7 that.

8 MR. MORRIS: I am going to ask you some of your
9 professional opinion on a couple places.

10 Is it your opinion that the increase in spring flows
11 from the Yuba River, as proposed in existing D-1644, would
12 that have a positive impact on the fisheries in the Yuba
13 River?

14 MR. LILLY: I'm going to object. I think
15 there is an uncertainty when we talk about the increase in
16 minimum plume flow requirements versus increases in the
17 flows actually in the river. So I'd appreciate
18 clarification.

19 CHAIRMAN BAGGETT: Clarify.

20 MR. MORRIS: Well, I will withdraw that
21 question. I will ask you this one instead:

22 Is it your opinion that the data that has been
23 presented in your declaration and in the declaration of
24 Mr. Mitchell that that is the best available data in the
25 Yuba River for studying fisheries and that that is the

1 best tool available for the State Water Resources Control
2 Board to base its decision on this matter?

3 MR. BRATOVICH: I won't speak for Mr. Mitchell
4 or for his testimony. I will speak for RST data. And it
5 is my opinion that that is best available information
6 pertinent to the downstream movements anadromous salmonids
7 in the Lower Yuba River.

8 MR. MORRIS: Do you want to answer that, Mr.
9 Mitchell?

10 MR. MITCHELL: You are referring to Exhibits C
11 and D?

12 MR. MORRIS: That is correct.

13 MR. MITCHELL: Yes. This is best available
14 data on long-term abundance of adult populations of
15 chinook salmon.

16 MR. MORRIS: That is all I have.
17 Thank you.

18 CHAIRMAN BAGGETT: Thank you.

19 The Board has a few questions. Start down with
20 Ernie and work this way.

21 ----oOo----

22 CROSS-EXAMINATION OF YUBA COUNT WATER AGENCY

23 BY STAFF

24 MR. MONA: I just have a few clarifying
25 questions for Mr. Aikens.

1 Mr. Aikens, when did Yuba County Water Agency file
2 an application with the Department of Water Resources for
3 groundwater storage construction grant for the Wheatland
4 groundwater storage project?

5 MR. AIKENS: I think it is in my declaration.
6 Let me check. In 2001 Yuba filed an application with
7 California Department of Water Resources for the Wheatland
8 Water District in lieu construction grant.

9 MR. MONA: Has Yuba County Water Agency and DWR
10 signed a grant contract yet?

11 MR. AIKENS: No, we haven't. And that's
12 because the Department of Water Resources has not yet
13 delivered its grant contract to Yuba County Water Agency.
14 We have numerous grants with the Department of Water
15 Resources and it takes some substantial time to get those
16 grants in our hands to sign. We have worked diligently
17 with the Department to move the grant progress forward and
18 get a grant in our hands to sign.

19 MR. MONA: I am a little confused. The water
20 sales agreement that is currently being negotiated with
21 Wheatland Water District, are those the standard water
22 supply contracts that Yuba has with all of its
23 contractors?

24 MR. AIKENS: It is a similar version of that,
25 yes.

1 MR. MONA: In paragraphs No. 7 and 8 of your
2 declaration states that Yuba County Water Agency delivered
3 to Dry Creek Mutual 8,809 acre-feet in year 2000. The
4 corrected amount was 2,898 acre-feet in 2001 and 6,153
5 acre-feet in 2002.

6 Are you referring to water years or calendar years?

7 MR. AIKENS: Those would be water years that
8 would start -- for example, 2001 refers to the water years
9 starting in October of 2000 and going through the year
10 2001.

11 MR. MONA: Can you tell us what the water year
12 classification was for the year 2000, 2001, 2002 based on
13 Yuba River index?

14 MR. AIKENS: 2001 was a critical year and 2002
15 was a below normal year.

16 MR. MONA: I know the area where you corrected
17 one of the amounts, so my question is: Are these water
18 delivery figures reported amounts provided to the Agency
19 by Dry Creek Mutual or are they --

20 MR. AIKENS: Just a second, I should have said
21 2002 was a dry year.

22 MR. MONA: Are the water delivery figures
23 reported the amounts provided to Yuba County Water Agency
24 by Cry Creek Mutual or are they recorded amounts by the
25 Agency?

1 MR. AIKENS: The surface water delivery
2 figures are off a propeller in the distribution system
3 where the Yuba County Water Agency main canal ends and the
4 Dry Creek distribution system starts, and those
5 measurements are read by a Yuba County Water Agency
6 employee.

7 MR. MONA: One more question.

8 What is the maximum annual amount of Yuba project
9 surface water that has ever been delivered to Dry Creek
10 Mutual to date?

11 MR. AIKENS: The maximum amount delivered of
12 surface water was 5,335. That was in -- excuse me. In
13 year 2000 there was 8,309 acre-feet and that was for a
14 period that the Dry Creek Mutual Water Company system was
15 not built out to its full capabilities nor to the
16 capability that it is today.

17 MR. MONA: Thank you. That is all I have.

18 MR. FECKO: Good afternoon. I will start with
19 Mr. Bratovich.

20 Do you have the Decision in front of you, Decision
21 1644?

22 MR. BRATOVICH: Yes, I do, Mr. Fecko.

23 MR. FECKO: If we look at the top of Page 61,
24 under the subheading mid April through June, could you
25 begin there and read the four bullet points?

1 MR. BRATOVICH: Yes. First bullet point:

2 Spring-run chinook juvenile rearing and
3 emigration, outmigration of young fish,
4 and adult upstream migration and holding

5 -- (Reading)

6 There is a footnote there.

7 -- April through June. Fall and late

8 fall-run chinook salmon juvenile rearing

9 and emigration, April through June.

10 Steelhead egg incubation, juvenile rearing

11 and emigration, April through June.

12 American shad upstream migration, spawning

13 and early rearing, late April through

14 June. (Reading)

15 MR. FECKO: In your professional opinion, are

16 those activities that take place in the Yuba River in

17 those time periods?

18 MR. BRATOVICH: Yes.

19 MR. FECKO: I have a question for

20 Mr. Mitchell.

21 Given the new methodology of actual carcass counts

22 above the Highway 20 bridge, what is the estimate of fish

23 spawning above the Highway 20 bridge? Obviously you said

24 15.5 percent may not be correct. Do you have any idea

25 what the actual percentage is?

1 MR. MITCHELL: I can only give you the range.
2 It's been -- since '94, it's ranged from around 25 percent
3 to 37 percent of the run has spawned above Highway 20.

4 MR. FECKO: Thank you. That is all I have.

5 MR. FRINK: I do have some questions.

6 Mr. Bratovich, were you involved in preparing the
7 instream flow recommendations that Yuba County Water
8 Agency presented at the Water Board hearing in 2000?

9 MR. BRATOVICH: Yes.

10 MR. FRINK: And do you recall for wet and
11 above normal years were the flows that Yuba County Water
12 Agency recommended in 2000 the same as the long-term flow
13 requirements that were adopted in Decision 1644?

14 MR. BRATOVICH: I don't directly recall. Are
15 they above normal and wet flows the same both under
16 interim and long term?

17 MR. FRINK: Yes.

18 MR. BRATOVICH: I seem to recall they may well
19 be.

20 MR. FRINK: Do you recall that there was a
21 difference in flow recommendations Yuba County Water
22 Agency presented for below normal years and the
23 recommendations that were ultimately adopted for long term
24 or the requirements that were ultimately adopted for
25 long-term flows in Decision 1644?

1 MR. BRATOVICH: I believe there was
2 distinction.

3 MR. FRINK: Do you have a copy of 1644?

4 MR. BRATOVICH: I have one here somewhere.

5 MR. FRINK: I wonder if you would look at the
6 back, Appendix 5. The second graph on Page 1 of Appendix
7 5.

8 MR. BRATOVICH: Are we looking at the instream
9 flow requirements, specifically?

10 MR. FRINK: Yes, the color lines here.

11 I just wanted to be clear on this. On below normal
12 years it is a little difficult to see because the lines
13 overlap, the orange and the blue. The orange were the
14 requirements that are adopted in Decision 1644 and the
15 blue were the recommendations that Yuba County Water
16 Agency made.

17 Is that your understanding?

18 MR. BRATOVICH: Looks like it according to the
19 legend. You will have to forgive me I -- again, I took
20 the notice very seriously about what I was prepared to
21 testify.

22 MR. FRINK: I understand.

23 In order to evaluate a recommended change I want to
24 be clear on what were the flows we are starting with. And
25 it looks to me that in below normal years that the only

1 difference between the recommendation from Yuba County
2 Water Agency and the long-term flow requirements
3 eventually adopted in Decision 1644 are during a period in
4 April, and I believe it's a nine-day period, and the
5 difference in the recommended versus the required flow is
6 a hundred cfs.

7 Do you see that from the graph? There is that
8 little box --

9 MR. LILLY: I am going to object to this line
10 of questioning. This line of questioning is asking
11 Mr. Bratovich to testify about his recommendation made in
12 2000 before the three years of RST data, which is the
13 whole point of this hearing and this issue. So the
14 questions are not appropriate for this hearing and in
15 essence are going to distort or attempt to distort the
16 facts here.

17 If Mr. Frink wants to ask questions about that, he
18 ought to ask questions that are based on Mr. Bratovich's
19 current understanding, not his understanding from three
20 years ago.

21 MR. FRINK: I don't have many more questions
22 about Yuba's full recommendations in 2000. I just wanted
23 to clarify that in above normal, wet and below normal
24 years Yuba's flow recommendations in 2000 before the data
25 from the rotary screw trap was available that Yuba's flow

1 recommendations were virtually the same as the
2 requirements ultimately adopted on 1644.

3 Is that your understanding, Mr. Bratovich?

4 MR. LILLY: I will raise the same objection,
5 that is not what we are here for today.

6 CHAIRMAN BAGGETT: I will overrule that. I am
7 going to ask very similar questions. You can object if
8 you want. I am trying to get resolved an issue before
9 this Board.

10 MR. FRINK: Is that your understanding,
11 Mr. Bratovich, for those three year types?

12 MR. BRATOVICH: It appears to be the case. I
13 apologize I am responding at the moment looking at the
14 figures. That appears what -- your statement appears to
15 be correct.

16 MR. FRINK: Now as I understand it, the basis
17 for your recommendation that the relatively higher flows
18 during the late spring that are required in Decision 1644
19 should be changed is that the data that you have obtained
20 for the rotary screw trap shows that the majority of
21 fall-run chinook salmon have already left the system by
22 that time; is that correct?

23 MR. BRATOVICH: I haven't testified as to
24 whether the recommendation should be changed or how it
25 should be changed. My testimony included essentially what

1 you're referring to regarding juvenile chinook salmon.
2 Yes, my analysis indicates that most of them have moved
3 downstream past the Hallwood RST by that time as well as a
4 relatively small percentage of the steelhead are moving
5 downstream during that time as well.

6 MR. FRINK: I guess I was assuming something
7 that you haven't stated. On the basis of the data that
8 you have gotten from the rotary screw trap would you, as a
9 biologist, recommend a change in the increase in flows
10 that is required in late spring under Decision 1644?

11 MR. BRATOVICH: That is a very difficult
12 question to answer. I will honestly try to do my best. I
13 am going to make two observations regarding flow and RST
14 data as it exists today, and as I've indicated in my
15 testimony and declaration.

16 My first observation regarding flow in the RST data
17 during this time period is that examination of the three
18 different monitoring seasons, which are characterized by
19 very different hydrologic conditions do not demonstrate an
20 apparent relationship between sustained flows and
21 outmigration or downstream movement of these individuals.

22 My second observation, which I think may have more
23 utility to you, is that it is obvious that during the one
24 year there was a very large and very rapid increase in
25 flow. Although it wasn't strictly in the April 21 through

1 June 30th period, it was for the first couple days of
2 July, this very large and rapid increase in flow was
3 accompanied by a very large peak of downstream movement
4 event of steelhead. So although sustained, relatively
5 high sustained flows don't appear to be related to
6 downstream movement, that very large and rapid increase
7 may well be associated with big peak in downstream
8 movement.

9 Really, that constitutes my conclusions regarding
10 flow. I will make one other observation, however. I
11 think that the current efforts of Yuba County Water
12 Agency, National Marine Fisheries, NOAA, Fish and Wildlife
13 Service, and Fish and Game to design and implement
14 monitoring studies such as these and full evaluation of
15 the variety of stressors that potentially affect this time
16 period and these life stages should continue to be
17 explored and addressed in order to consider changing
18 D-1644.

19 MR. FRINK: You believe the work that is now
20 underway should be completed in order to develop any
21 different flow requirements than are in Decision 1644; is
22 that correct?

23 MR. BRATOVICH: That is correct, and I do
24 believe we have a good start on getting some of this
25 information. I indicated we just have half a season of

1 capture efficiency information, and there are numerous
2 other considerations, as you know, regarding instream flow
3 requirements in a decision such as this, and they are not
4 all flow. There are nonflow issues and other
5 considerations during this time period as well.

6 MR. FRINK: But as we sit here today, you are
7 not recommending that the flow requirements for wet, above
8 normal and below normal years that are set in Decision
9 1644 should be changed solely on the basis of rotary screw
10 trap data; is that correct?

11 MR. BEZERRA: Mr. Baggett, I simply can't hear
12 Mr. Frink's questions. I need him to speak into the
13 microphone.

14 MR. FRINK: Maybe I am just not speaking into
15 it.

16 Mr. Bratovich, is it accurate to state that as we
17 sit in this room today you have not recommended a revision
18 of the long-term flow requirements in Decision 1644 for
19 wet, above normal and below normal years that is based on
20 the data from the rotary screw traps?

21 MR. BRATOVICH: I am not making a specific
22 recommendation, but I am continuing to illustrate
23 primary considerations stated in D-1644 is not supported
24 by the RST data.

25 MR. FRINK: You would recommend continuing the

1 efforts you referred to with the other fishery resource
2 agencies to get more complete data; is that correct?

3 MR. BRATOVICH: Yes. There is that old saying
4 that a biologist will always say they want more data. In
5 this instance there is a very positive, very contributory
6 effort underway to continue to design and implement these
7 kind of studies to provide additional clarification
8 regarding these issues, absolutely.

9 MR. FRINK: Appreciate that.

10 Mr. Mitchell, your declaration discusses the
11 estimates of the annual fall-run chinook salmon escapement
12 in the Lower Yuba River.

13 Are you generally familiar with the flows that have
14 occurred in the Lower Yuba River from 1953 through to
15 2002, the period that is covered in your declaration?

16 Mr. Mitchell, I think am speaking into the
17 microphone. I will try again.

18 Mr. Mitchell, your declaration discusses the annual
19 escapement of fall-run chinook salmon in the Lower Yuba
20 River during the period of 1953 through 2002.

21 Are you generally familiar with the flow regime that
22 has occurred in the Lower Yuba River during those years?

23 MR. MITCHELL: I have reviewed those flow
24 regimes going back to 1953, but it's been a very long
25 time, and I think that the last time I looked at all those

1 was probably in the 1992 hearing. So I can't speak
2 specifically to any one year or flow or if that is what
3 you are asking.

4 MR. FRINK: Are you generally familiar with the
5 fact that the average flows in the Lower Yuba River have
6 exceeded the long-term flow requirements in Decision 1644?

7 MR. LILLY: I have to object. The question is
8 vague when you are trying to talk about average flows over
9 a whole year and it may very well be different during
10 different seasons during the year.

11 CHAIRMAN BAGGETT: Clearly.

12 MR. FRINK: I unfortunately do not have the
13 data in front of me now, too.

14 Is it your understanding that overall the historic
15 flows in the Lower Yuba River have exceeded minimum flow
16 requirements established in Decision 1644?

17 MR. LILLY: Same objection.

18 CHAIRMAN BAGGETT: Answer to the best of your
19 ability. I realize none of us have the data. Do you have
20 a minimum?

21 MR. MITCHELL: I actually don't know the
22 answer to that.

23 MR. FRINK: You don't have an opinion if the
24 flow requirements in the Lower Yuba River have generally
25 exceeded the minimum flow set in Decision 1644?

1 MR. MITCHELL: I haven't looked at those to
2 give you an answer.

3 MR. FRINK: The gist of what I see in your
4 declaration is that you believe that there has been an
5 increase in the population of fall-run chinook salmon
6 based on the escape data that you have attached, that you
7 attached and submitted with your declaration; is that
8 correct?

9 MR. MITCHELL: I'm sorry --

10 MR. FRINK: The gist of your declaration and
11 your opinion there has been an increase in the population
12 of fall-run chinook salmon as shown in the data attached
13 and submitted with your declaration?

14 MR. MITCHELL: Yeah, I will say that the
15 average data has increased during the Bullards Bar period,
16 yes.

17 MR. FRINK: You don't know if the flows during
18 that period have been less than or more than the flows
19 under Decision 1644; is that right?

20 MR. MITCHELL: That is because I have to go
21 back and look at D-1644 flows to answer that. I haven't
22 looked at them recently to be honest and so I can't answer
23 that at this point.

24 MR. FRINK: You were also involved in
25 presenting the flow recommendations on behalf of Yuba

1 County Water Agency at the Water Board hearing in 2000; is
2 that correct?

3 MR. MITCHELL: Yes, that is correct.

4 MR. FRINK: Is it your understanding that the
5 interim flow requirements established in Decision 1600 are
6 very close to the flow requirements that Yuba County Water
7 Agency recommended to be established on a long-term b
8 asis?

9 MR. MITCHELL: I have to answer that I am just
10 not prepared to answer these questions because I haven't
11 had the time to review those flows and to look back and
12 compare those with historical flows or any other flow.

13 MR. FRINK: So is it accurate to say that you
14 wouldn't be asking the Board to or recommending to the
15 Board that the flow requirements in Decision 1644 should
16 be changed on the basis of population data that was
17 submitted with your declaration?

18 MR. LILLY: I'm going to object that this goes
19 way beyond the scope of Mr. Mitchell's direct testimony
20 and the hearing issues.

21 MR. FRINK: May I respond?

22 CHAIRMAN BAGGETT: I think it is appropriate.
23 You are asking this Board -- you are having the Court ask
24 this Board to consider additional data on fish flows to
25 modify, rescind or vacate or do something to our previous

1 order which is in place now, 1644. It is quite
2 appropriate for expert witnesses who testified in those
3 proceedings before this Board, and his declaration is
4 before us, who are the experts which I trust you set your
5 flow recommendations to this Board before, to answer
6 questions regarding that.

7 If we are going to look at the context of if there
8 is a modification or not, whether we should continue it,
9 just vacate everything and ask for more studies, we have
10 to put it in context of the existing order and the record
11 which is before this Board which is a supplement.

12 MEMBER CARLTON: Mr. Chairman, may I make
13 further comment on that?

14 I believe the earlier stages of this hearing we were
15 advised, if not admonished, by some of the water district
16 counsel about the importance and significance of us as
17 Board Members putting the new information that we are
18 receiving today in the context of past information. There
19 were numerous questions put forth to that effect by water
20 district counsel. So I think this line of questioning is
21 consistent with that.

22 MR. FRINK: I guess I will repeat the question
23 and slightly rephrased.

24 But it is my understanding that based on population
25 data that you have submitted with your declaration you are

1 not recommending to the Board that that data supports any
2 revision in the flow requirements established in Decision
3 1644; is that correct?

4 MR. LILLY: Let me just state the basic
5 problem I have. The question assumes that Mr. Mitchell
6 and Mr. Bratovich agreed with D-1644 to begin with, and
7 that is the incorrect assumption here. Mr. Frink is in
8 essence saying that assuming you agreed with D-1644 to
9 begin with, do you recommend changing it now. And
10 obviously they do not agree with it to begin with.

11 MR. FRINK: Could I respond to that?

12 CHAIRMAN BAGGETT: I don't think that is what
13 he is asking. He is not asking agreement. He is asking
14 the difference based on -- answer.

15 I am sorry, Mr. Frink.

16 MR. FRINK: In fact, for wet and above normal
17 years the long-term flow requirements in Decision 1644 are
18 what was recommended by Yuba County Water Agency and below
19 normal flow requirements are very, very similar. But that
20 isn't my question.

21 My question is: Do you believe that the population
22 data you have submitted warrants a revision in the flow
23 requirements in Decision 1644? That is my question to
24 Mr. Mitchell.

25 MR. LILLY: I have the same objection.

1 CHAIRMAN BAGGETT: Object away. I will
2 overrule it. I think that is a very appropriate question.

3 MR. MITCHELL: Without going back and analyzing
4 those flows and doing a full analysis, I cannot answer at
5 this time.

6 MR. FRINK: I recall reading a report that
7 Yuba County Water Agency submitted to FERC. I believe it
8 was in the year 2000, and it reported on changes in the
9 population of chinook salmon in the Lower Yuba River since
10 the construction of New Bullards Bar Project.

11 Is that a report you were involved in preparing,
12 Mr. Mitchell?

13 MR. MITCHELL: You will have to be more
14 specific.

15 MR. FRINK: I recall a statement in this
16 report -- if you don't recall that is fine. But I recall
17 a statement in the report that there have not been a
18 statistically significant change in the population of
19 fall-run chinook salmon since construction of New Bullards
20 Bar.

21 Do you recall such a statement in any report that
22 you helped prepare?

23 MR. MITCHELL: You are saying statistical
24 significant. No, we did not make a statement regarding
25 whether they were statistically significant.

1 MR. FRINK: I believe you testified earlier
2 that you didn't do any statistical analysis of the
3 population numbers that are included with your declaration
4 and attempt to make a finding of whether the change in
5 population has been statistically significant since the
6 construction of New Bullards Bar; is that correct?

7 MR. MITCHELL: That is correct.

8 MR. FRINK: Just a few more questions.

9 Mr. Aikens, your declaration refers to the project
10 that I believe is named the Yuba Wheatland In Lieu
11 Groundwater Recharge and Storage Project. Is that the
12 name -- excuse me. There is an attachment to your
13 declaration with some correspondence with the Department
14 of Water Resources and that referred to the Yuba Wheatland
15 In Lieu Groundwater Recharge and Storage Project.

16 My question is: Is Yuba River water that was
17 delivered as a part of that proposed project, will that be
18 used for groundwater recharge?

19 MR. AIKENS: Yes, it will. The concept is
20 that in lieu recharge is -- allows the basin to recharge
21 without the draft on the groundwater. Some of that is
22 recharge from other areas. Some of it is recharge from
23 percolation, from surface water deliveries, but the demand
24 on the groundwater system is less. The recharge is
25 increased so you have the ability to restore the aquifer

1 to higher levels than were previously -- than are there
2 now with the groundwater pumping that is going on.

3 MR. FRINK: Will any of the surface water from
4 the Yuba River be applied directly to groundwater
5 recharge?

6 MR. AIKENS: We do have discussions ongoing
7 now about a groundwater recharge area that we are
8 considering in the process. No formal decision has been
9 made at this point in time.

10 MR. FRINK: To your knowledge, is groundwater
11 recharge and storage listed as a purpose of use in Yuba
12 County Water Agency water right permits from the State
13 Water Board?

14 MR. AIKENS: I don't have knowledge at this
15 point in time.

16 MR. FRINK: How much Yuba River water does
17 Yuba County Water Agency intend to deliver for groundwater
18 recharge to the Wheatland area?

19 MR. AIKENS: If you look at an in lieu
20 recharge basis, I would say that you are taking the
21 existing groundwater pumping off-line and that would be an
22 in lieu recharge. I don't have specific numbers, but I
23 would say it would range from the order of 20,000 to
24 30,000 acre-feet.

25 MR. FRINK: I wonder if we can make the

1 distinction between in lieu recharge and direct recharge.
2 Is there a proposal to use surface water from the Lower
3 Yuba River to directly recharge the groundwater basin?

4 MR. AIKENS: As I said before, there is a
5 recharge basin that is being considered in general from a
6 hydrologic standpoint it doesn't matter whether the
7 recharge is direct or if it is a reduction of demand on
8 the system. It has the same out of increasing the storage
9 in the groundwater aquifer.

10 MR. FRINK: If water from the Yuba River were
11 to be used for groundwater recharge, could that water be
12 diverted during winter months?

13 MR. AIKENS: Some water would be diverted
14 during the winter months. We do have canal operation
15 maintenance where we shut down our canal, and that is
16 generally performed during a couple of the winter months.
17 That would limit any winter month groundwater recharge
18 capability. Also, in general, the soils in Yuba County
19 are relatively tight compared to other areas. There are
20 areas where more is in the streambed, areas where there is
21 more recharge capability. But in general the soils are
22 such that there is not a large recharge capability from
23 surface water.

24 MR. FRINK: I believe that the letter from the
25 Department of Water Resources to Yuba County Water Agency,

1 dated June 28, 2002, that was attached to your declaration
2 states that a benefit of the Wheatland Project would be
3 providing instream flows in the Bear River, Dry Creek,
4 Best Slough and Hutchison Creek.

5 Do you recall that being proposed as a benefit of
6 the Wheatland groundwater project?

7 MR. AIKENS: Yes, in general.

8 MR. FRINK: So would the flow enhancement that
9 is referred to in the Department of Water Resources letter
10 result from delivery of surface water from the Yuba River
11 to the Wheatland area?

12 MR. AIKENS: I would say as a result of the
13 overall project if you are asking me to get more specific
14 than that I would have to review the actual grant
15 application to give you an answer.

16 MR. FRINK: Has Yuba County Water Agency
17 discussed with the Department of Fish and Game if the
18 Department of Fish and Game would prefer to divert water
19 from the Lower Yuba River to enhance flows in Bear River,
20 Dry Creek, Hutchison Creek and Best Slough or to use the
21 water for instream flows in the Yuba River?

22 MR. AIKENS: I am not aware of any
23 discussions.

24 MR. FRINK: Did Yuba County Water Agency do an
25 environmental impact report that weighs the benefits in

1 diverting water from the Lower Yuba River or enhancing the
2 flows in other streams?

3 MR. AIKENS: I would say that the enhancements
4 of flows in these other streams are pretty much incidental
5 to the amount of overall water that would be diverted out
6 of the Yuba River. I would have to look at the report to
7 get more specific information on that.

8 MR. FRINK: You may have already stated this.
9 I apologize if you have. How much water does Yuba County
10 Water Agency now propose to divert to the Wheatland area
11 as a part of this in lieu groundwater recharge and storage
12 project?

13 MR. AIKENS: Our grant application calls for
14 about 36,000 acre-feet plus, somewhere between 36- and
15 37,000 acre-feet.

16 MR. FRINK: I believe that is all the
17 questions I have.

18 Thank you.

19 CHAIRMAN BAGGETT: I have just a couple.

20 ---oOo---

21 CROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

22 BY BOARD MEMBERS

23 CHAIRMAN BAGGETT: Mr. Mitchell is probably
24 the most appropriate. I am just trying to understand
25 salmon spawning escapement data you have something here

1 since 1995, it appears.

2 Obviously, the new sampling method or the one
3 applied the last few years has shown an increase in actual
4 count over what was estimated. Is there a method, as the
5 professional in field, that you are aware of? How would
6 you personally, I guess, extrapolate those numbers
7 backwards to 1953, would you come up with the same general
8 proportion increase?

9 MR. MITCHELL: I would think that applying the
10 25 to 37 percent that we have identified doing actual
11 surveys would not be appropriate because we don't know if
12 that's changed over the years, even going back to 1953. I
13 think those are appropriate for the years they were done.
14 And it is very hard to extrapolate that kind of estimate
15 or make assumptions, and I think that is why it is
16 dangerous to extrapolate from 15 and a half percent over a
17 long period of time by the same token.

18 CHAIRMAN BAGGETT: The previous data collected
19 from '53 until you came up with an actual number, was it a
20 consistent -- I think there was testimony earlier, one of
21 you testified it was same sapling spot, the same
22 methodology Fish and Game used for that period?

23 MR. MITCHELL: Yes. From the records we were
24 all to obtain from the Department of Fish and Game, the
25 method was a recapture method. The data and the records

1 become very scant as you go further back in time.

2 CHAIRMAN BAGGETT: I notice a lot of zeros.

3 MR. MITCHELL: The records are not available
4 -- were not available or were based on secondhand
5 information. So as we go back in time, the records are
6 less vigorous on what is recorded.

7 CHAIRMAN BAGGETT: It is hard to place a lot
8 of confidence on that old data as opposed to what you are
9 doing?

10 MR. MITCHELL: I think there is less
11 confidence in the methodology that was proposed. We do
12 have more confidence in the last 30 or so years because of
13 the records. But beyond that the records do become scant
14 and we don't -- can only assume that that methodology was
15 used.

16 CHAIRMAN BAGGETT: So since the operation of
17 the dam, basically the cutoff date was the dam was put in
18 and you are more confident in the numbers from that date,
19 more or less became operational?

20 MR. MITCHELL: We do have records of surveys
21 going back to the mid '60s and statements that there were
22 either carcass surveys or counts done during that time.
23 We know that the records are generally consistent, though,
24 beginning after the dam was built and at least the records
25 are more complete, I will say, once the dam went in

1 operation.

2 CHAIRMAN BAGGETT: How many years -- how many
3 additional years' data of the methodology you are now
4 using for your surveys, from either or both of the
5 fisheries experts here, would it take before you have a
6 statistically valid number upon which you can base flows?
7 Is it going to take ten more years, 20 more years, two
8 more years? I think it's been testified by both you that
9 we really need more data. You finally have a methodology
10 that works, but what are we looking at?

11 MR. MITCHELL: I think that what you are
12 seeing, though, and I will say that there is enough
13 confidence in the estimates that they do represent the
14 trend in population which is stable or increasing during
15 this period after the reservoir went into operation.

16 CHAIRMAN BAGGETT: So I guess in essence we
17 don't need more, we have enough data here on which to make
18 decisions?

19 MR. MITCHELL: My professional opinion is that
20 the data is -- suggest a stable population.

21 CHAIRMAN BAGGETT: With the addition of the
22 new data which are we just taking evidence on?

23 MR. MITCHELL: You are talking about
24 additional RST?

25 CHAIRMAN BAGGETT: The last three years' worth

1 of data.

2 MR. MITCHELL: Yes, and simply adds to that
3 conclusion.

4 CHAIRMAN BAGGETT: No other questions.
5 Redirect?

6 ---oOo---

7 REDIRECT EXAMINATION OF YUBA COUNTY WATER AGENCY

8 BY MR. LILLY

9 MR. LILLY: Mr. Mitchell, there is still some
10 confusion regarding the carcass surveys, and I would like
11 you to just get it clear once and for all. Do the carcass
12 surveys, do they get fall-run adult chinook salmon,
13 spring-run adult chinook salmon or both?

14 MR. MITCHELL: They would get both. And as I
15 have said the spring-run cannot be distinguished from the
16 fall-run, so we have not been able to separate those
17 estimates and to partition these estimates into spring and
18 fall-run.

19 MR. LILLY: To distinguish an adult spring-run
20 from an adult fall-run what would you have to do?

21 MR. MITCHELL: There would be genetic tests
22 which could be done. And to the extent that those are
23 able to distinguish the two, that would be a valid method.

24 And the other method for attempting to estimate
25 spring-run populations would be to either trap or monitor

1 fish moving up the river during the spring and counting
2 those fish, the spring-run, essentially the spring-run,
3 during the time that they would be expected to be
4 migrating.

5 MR. LILLY: For any of the carcass surveys,
6 were any of those genetic analyses done to determine
7 whether or not there was, in fact, any distinction between
8 fall-run and spring-run in the carcasses?

9 MR. MITCHELL: We have no data. Tissue
10 samples have been collected from carcasses on the Yuba
11 River during the -- actually the spawning escapement
12 surveys that we have been doing by the Department of Fish
13 and Game. We don't have yet the results of those genetic
14 studies.

15 MR. LILLY: And just to clarify, do the
16 spring-run adult and the fall-run adults spawn in the same
17 reaches of the Lower Yuba River?

18 MR. MITCHELL: They do spawn in the same
19 reaches, yes.

20 MR. LILLY: Do they both spawn during the
21 period in which your carcass surveys are conducted?

22 MR. MITCHELL: We do have spawning fish in
23 September which are considered to be spring-run, although
24 it is still not clear whether at what point we have --
25 spring-run basically stops and fall-run do. What we do

1 suspect is that both the spring-run overlaps the fall-run
2 substantially.

3 MR. LILLY: Do we, in fact, know whether or
4 not there is a genetic difference in the Yuba River
5 between spring-run and fall-run?

6 MR. MITCHELL: We don't know yet.

7 MR. LILLY: You mentioned that you could also
8 or one could also count the spring-run adults migrating up
9 during the spring; is that correct?

10 MR. MITCHELL: That's correct.

11 MR. LILLY: Has that kind of data been
12 collected on the Yuba River?

13 MR. MITCHELL: I am aware of only one instance
14 where counts were done I believe in 2001 by the Department
15 of Fish and Game during the spring of that year. And I
16 was trying to remember the estimate, but couldn't remember
17 that. But I do remember that was the only year where I
18 think there might be an estimate of run size.

19 MR. LILLY: That would be of spring-run adults
20 migrating upstream.

21 MR. MITCHELL: That's right.

22 MR. LILLY: Going to your Exhibit D of your
23 declaration, I think this is a nomenclature question.
24 If these carcasses could either be spring-run or fall-run,
25 why do you refer to them in your nomenclature as fall-run?

1 MR. MITCHELL: The carcass survey is done
2 during the primary fall-run chinook salmon period. That
3 is generally agreed that is the primary run for fall-run
4 chinook salmon.

5 MR. LILLY: But could what you call fall-run
6 in these numbers actually also include the spring-run
7 adults?

8 MR. MITCHELL: As I said, yes, that is
9 correct.

10 MR. LILLY: Mr. Aikens, there was one minor
11 point I wanted to clarify. I think Mr. Morris asked you
12 whether or not a delivery system of Yuba River water to
13 the Wheatland area was included in the original project,
14 and you said yes; is that correct?

15 MR. AIKENS: That's correct.

16 MR. LILLY: There have been so many projects
17 discussed today and earlier. I would like you to clarify
18 what you meant by the original project.

19 MR. AIKENS: The original project is when the
20 Yuba River Development Project was designed, the original
21 design, and not only the existing dams and reservoirs and
22 power generation, it also included a delivery system of
23 canals going all the way down to the Wheatland area.

24 MR. LILLY: So that was the design made in the
25 1960s?

1 MR. AIKENS: That's correct.

2 MR. LILLY: I have no further questions.

3 Thank you.

4 CHAIRMAN BAGGETT: Any party have recross?

5 MR. HUTCHINS: No questions from SYRCL.

6 CHAIRMAN BAGGETT: Any further questions?

7 ---oOo---

8 FURTHER RECROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

9 BY STAFF

10 MR. FECKO: Mr. Mitchell, you just mentioned

11 in response to Mr. Lilly some spring-run up migration.

12 Are you aware of what time of the year that takes place?

13 MR. MITCHELL: The Central Valley spring-run
14 chinook salmon historically migrating in the rivers of the
15 Central Valley during the spring, starting typically in
16 March and extending into June.

17 MR. FECKO: Thank you.

18 MR. FRINK: Mr. Mitchell, that prompted a
19 question in my mind.

20 Is there a flow level on the Lower Yuba River at
21 which the fish ladders at Daguerre Point do not work
22 effectively?

23 MR. MITCHELL: There are indications that very high
24 flows may create problems with the traction, although
25 there has never been studies or observations to determine

1 at what flow that occurs, only -- I will say that there
2 have been observations of fish that apparently aren't
3 moving. We don't know why, but it appears there may be
4 some problem in finding the ladders at very high flows.

5 MR. FRINK: Is there ever a problem with very
6 low flows?

7 MR. MITCHELL: Not that I am aware of.

8 CHAIRMAN BAGGETT: Mr. Brandt, limited to the
9 redirect.

10 ----oOo----

11 FURTHER RECROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY

12 BY DEPARTMENT OF THE INTERIOR

13 BY MR. BRANDT

14 MR. BRANDT: I understand.

15 Mr. Mitchell, if you cannot distinguish between
16 spring-run and fall-run, then you can't make any
17 conclusion about whether spring-run is stable or not
18 compared to the old data; isn't that right?

19 MR. MITCHELL: That is correct.

20 MR. BRANDT: You don't have any conclusion
21 about whether spring-run, which is a listed DFA, species
22 is stable at this point compared to preproject?

23 MR. MITCHELL: I will go back to my previous
24 testimony. We don't have quantitative data to support the
25 conclusion one way or another. What we do have is the

1 changes in environmental conditions since the project that
2 have improved conditions for spring-run.

3 MR. BRANDT: But you can't make any
4 conclusions based on data you gave us?

5 MR. MITCHELL: That is correct.

6 MR. BRANDT: Mr. Aikens, let me ask you a
7 question about Wheatland which you said was part of the,
8 if I understood correctly, was part of the original
9 project plan. So now that you are negotiating a contract
10 with Wheatland, are you assuming going into this
11 negotiation that 1644 or something like it, very similar
12 as far as flow regime, is going to be in place and it will
13 provide enough water to service Wheatland?

14 MR. AIKENS: We are assuming that with
15 whatever flow regime goes in place that there will be
16 water during enough time periods to make the Wheatland
17 Water District Project an economic project to move
18 forward. We are assuming that the instream flow
19 requirements will be met and then we will go forward from
20 there; that is data that we will continue to look at as we
21 move forward with the project.

22 MR. BRANDT: The instream flow requirements
23 that you are looking at and assuming is D-1644?

24 MR. LILLY: Objection. Whether he means
25 long-term or interim. The question is vague.

1 CHAIRMAN BAGGETT: Clarify.

2 MR. BRANDT: Let me ask you both of those. Is
3 the assumption that you are using in negotiating with
4 Wheatland which apparently is part of the original
5 project, is that you will have flow requirements that are
6 at the interim level?

7 MR. AIKENS: We have looked at that. We will
8 continue to look at that as we move forward with the water
9 sales agreement.

10 MR. BRANDT: In negotiating this water sales
11 agreement you haven't made any assumptions about whether
12 D-1644 or anything else at this point, but you have
13 concluded, nevertheless, concluded that there will be
14 enough water for them?

15 MR. AIKENS: In general, yes.

16 MR. BRANDT: Thank you.

17 ---oOo---

18 FURTHER RECROSS-EXAMINATION OF YUBA COUNTY WATER AGENCY
19 BY BOARD MEMBERS

20 MEMBER CARLTON: One last question for
21 Mr. Mitchell. Hopefully to finely clarify something for
22 me here that I believe I heard you say in some of your
23 earlier testimony. This relates to your Exhibit D
24 escapement chart and your opinion on the post Bullards Bar
25 population condition versus the pre Bullards Bar, and I

1 believe it was your testimony that the population post
2 Bullards Bar has been stable, if not increasing slightly;
3 is that correct?

4 MR. MITCHELL: That's correct.

5 MEMBER CARLTON: I believe if I recall during
6 some earlier questioning there was a question posed to you
7 as to whether you examined the flow regimes post Bullards
8 Bar as opposed to pre Bullards Bar to determine what
9 effect, if any, the differences in flow regimes might have
10 and I believe your response was that you assumed due to
11 the long periods, relatively long periods of records post
12 and pre, that they were essentially equivalent flow
13 conditions; is that correct?

14 MR. MITCHELL: Equivalent water year types.

15 MEMBER CARLTON: For purposes of considering
16 flow to be a factor, your answer was that you considered
17 both periods to be equivalent to flow year type?

18 MR. MITCHELL: I did testify that because of
19 New Bullards Bar there were higher flows during -- after
20 the project started, there were higher flows that had
21 existed previously. We do -- I did testify to that, yes.

22 MEMBER CARLTON: Thank you.

23 CHAIRMAN BAGGETT: Have any other redirect
24 based on those questions?

25 MR. LILLY: No.

1 CHAIRMAN BAGGETT: I think we will put rebuttal
2 off to tomorrow so we can be thinking. I would like to
3 get a better idea of exactly who we are expecting for
4 rebuttal so we can plan some time. If parties know who
5 they're having, it would be helpful. Then we have to
6 resolve this closing argument.

7 We can go off the record.

8 (Discussion held off the record.)

9 CHAIRMAN BAGGETT: We will start promptly at
10 9:00 tomorrow.

11 (Hearing adjourned at 4:40 p.m.)

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1 REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to printed format, and the pages numbered 7 through 242 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 10th day of June, 2003.

ESTHER F. SCHWARTZ
CSR NO. 1564